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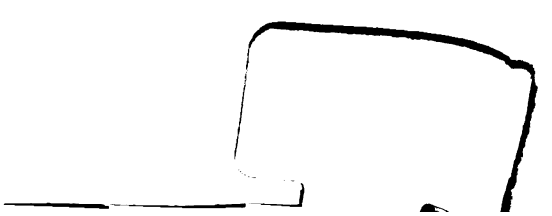

DL
AV
ON

THE

LAW

OF

LANDLORD AND TENANT;

INCLUDING

LEASES,	COPYHOLDS, &c.
ASSIGNMENTS,	LODGINGS,
TENANTS IN FEE,	WASTE,
——— FOR LIFE,	FIXTURES,
——— FOR YEARS,	NOTICE TO QUIT,
——— AT WILL, &c.	EJECTMENT,
RENT,	DISTRESS,
MORTGAGES,	REMEDIES FOR LANDLORD,
CORPORATIONS,	——— TENANT,
ECCLESIASTICAL PERSONS,	POORS RATE.

TO WHICH IS ADDED

AN APPENDIX OF PRECEDENTS.

By WILLIAM WOODFALL,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

LONDON:

PRINTED FOR J. BUTTERWORTH, LAW-BOOKSELLER,

FLEET STREET.

1802.

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TO

THE RIGHT HONOURABLE

JOHN LORD ELDON,

BARON ELDON OF ELDON IN THE COUNTY PALATINE OF DURHAM,

LORD HIGH CHANCELLOR OF GREAT BRITAIN

&c. &c. &c.

THIS WORK IS DEDICATED;

WITH THE MOST PROFOUND RESPECT

FOR HIS LORDSHIP'S EXTENSIVE KNOWLEDGE

AND DISTINGUISHED TALENTS

AS A LAWYER,

AND INTEGRITY AS A MAN,

AND

WITH GRATEFUL REMEMBRANCE

OF HIS LORDSHIP'S PERSONAL KINDNESS;

BY HIS LORDSHIP'S

MOST OBEDIENT HUMBLE SERVANT,

WILLIAM WOODFALL, JUNIOR.

PREFACE.

THE importance of the ſubject of this compilation is too manifeſt to render any apology neceſſary for offering the following work to the public. Without meaning to detract from the merit of other treatiſes that reſpect the LAW of LANDLORD and TENANT, it cannot but be obſervable that the views of the ſubject contained in ſuch publications are very limited, and that the manner in which it is generally treated is not ſufficiently perſpicuous for ordinary comprehenſion, and is too immethodical for profeſſional reference.

In arranging his materials therefore, the author has endeavoured to render the following work uſeful not merely to that branch of the Profeſſion of which he has the honour to be a member, but alſo to that very valuable body of Gentlemen who are more immediately connected with the reſpective parties whoſe rights and duties are the ſubject of enquiry: He has indeed been deſirous to convey without obſcurity ſuch information as he has been able to collect, to every one who ſtands in the relation of LANDLORD or TENANT; a condition from which a very ſmall part of the community is exempt.

The

The labour which ſuch a work might have otherwiſe occaſioned, has in the preſent inſtance been greatly abridged by the able manner in which particular parts of the ſubject have been treated by the ſeveral Gentlemen who have written upon them. It muſt indeed be obvious to the reader, that the author has in many inſtances availed himſelf of their reſpective productions by taking their abridgments of the particular ſubject, in preference to any of his own which would probably have been leſs clear and ſatisfactory. With reſpect to other aid than that alluded to, the author mentions with pride and ſatisfaction his obligations to his valuable friend Mr. *Tidd*. To that gentleman's profeſſional knowledge and comprehenſive mind, he is greatly indebted for thoſe parts of the work which by their analytical form facilitate reſearch and elucidate information.

The claim of a compiler to any merit for his performance, muſt be at beſt, merely negative. The compiler of this work will have attained his object, if it be found that he has in any tolerable degree, combined accuracy of reſearch with clearneſs of explanation.

No. 4, Inner Temple lane,
March 1, 1802.

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THE

THE

LAW

OF

LANDLORD AND TENANT,

&c. &c. &c.

CHAPTER I.

SECTION I. *Of Leaſes in general.*
SECTION II. *Of regiſtering Leaſes.*

SECTION I. *Of Leaſes in general; what and how made.*

Of Property in general.

PROPERTY, when it extends beyond the right of poſſeſſion and uſe, is the creature of poſitive law; and as there can be no individual right in things beyond the right of actual poſſeſſion and uſe, unleſs by virtue of municipal inſtitution, the modes of enjoying property in things muſt be referred to poſitive law and be governed thereby: for all things being, as far as they are capable, appropriated, muſt, unleſs alienated according to the forms thereby preſcribed, fall to the ſhare of the civil occupant, whoſe title is ſuperior to every perſon's, except his who claims by a better, *viz.* that of an alienee having a good title from the alienor.

Powell on Pow. 470.

Of an Eſtate for Years.

An eſtate for years is a contract for the poſſeſſion of lands or tenements for ſome determinate period; and it takes place, when a man lets them to another for the term of a certain number of years agreed upon between the leſſor and the leſſee, and the leſſee enters thereon. If the leaſe be but for half a year, or a quarter, or any leſs time, this leſſee is reſpected as a tenant for years, and is ſtyled ſo in ſome legal proceedings; a year being the ſhorteſt term of which the law, in this caſe, takes notice.

2 Bl. Com. 140.

This eſtate is eſteemed in law a middle kind of intereſt, between an eſtate for life and a tenancy at will: for thoſe who held large diſtricts and tracts of land being unacquainted with the arts of huſbandry and tillage, found it their intereſt to leaſe out their demeſnes, which, for want of care and cultivation, lay waſte, and afforded them little or no profit; and this way of letting for years was thought beſt to anſwer the deſign and intentions of the lord, as well as the expectations of the tenant: for if they had let them for life, this had given the tenants too great a power over the lord, becauſe then they would have had a property in the freehold, and by ſuffering diſſeiſins or feigned recoveries to be had againſt themſelves, might have ſhaken or endangered the inheritance of the owner; and on the other ſide, if they had leaſed their land only at will, few would have choſen to beſtow any great pains or induſtry upon ſo precarious a poſſeſſion, which the arbitrary will and pleaſure of a peeviſh lord might have defeated.

Bac. Abr. tit. Leaſes.

Thus, theſe eſtates were originally granted to mere farmers or huſbandmen, who every year rendered ſome equivalent in money, proviſions, or other rent, to the leſſors or landlords; but in order to encourage them to manure and cultivate the ground, they had a permanent intereſt granted them, not determinable at the will of the lord. Their poſſeſſion, however, was eſteemed of ſo little conſequence, that they were rather conſidered as the bailiffs or ſervants of the lord, who were to receive and account for the profits at a ſettled price, than as having any property of their own: they were, therefore, not allowed to have a freehold eſtate, but their intereſt, ſuch as it was, veſted after their deaths in their executors, who were to make up the accounts of

2 Bl. Com. 141.

their teſtator with the lord, and his other creditors, and were entitled to the ſtock upon the farm. The leſſee's eſtate might alſo, by the antient law, be at any time defeated by a common recovery ſuffered by the tenant of the freehold; which annihilated all leaſes for years then ſubſiſting, unleſs afterwards renewed by the recoverer, whoſe title was ſuppoſed to be ſuperior to his by whom thoſe leaſes were granted.

While eſtates for years were thus precarious, it is no wonder that they were uſually very ſhort, like our modern leaſes upon rack-rent; and indeed, we are told that, by the antient law, no leaſes for more than forty years were allowable, becauſe any longer poſſeſſion, (eſpecially when given without any livery declaring the nature and duration of the eſtate,) might tend to defeat the inheritance. Beſides, ſuch leaſes were only made to ſerve the occaſions and exigencies of the lord in cultivating and improving his demeſnes; not to borrow money upon, or to raiſe portions for daughters, or ſuch other uſes as are now made thereof: therefore there was no need to extend them to any great length of time, ſince they might be renewed as often as occaſion required; the leſſees likewiſe, if they were evicted, being only to recover damages, it would have been fruitleſs to prolong leaſes for the term of a thouſand years, when the perſons who would have to poſſeſs under ſuch leaſes had no remedy for their damages, but by recourſe to the repreſentatives of the original leſſor. The law, however, that reſtricted the duration of leaſes for years to forty years, if it ever exiſted, was ſoon antiquated: for we may obſerve in Madox's Collection of Antient Inſtruments, ſome leaſes for years of an early date, which conſiderably exceed that period; and long terms for three hundred years, or a thouſand, were certainly in uſe in the time of Edward III. and probably of Edward I. But undoubtedly when by the ſtatute 21 H. 8. c. 15. the termor (that is, he who is entitled to the term for years) was protected againſt theſe fictitious recoveries, and his intereſt rendered ſecure and permanent, long terms began to be more frequent than before; and were afterwards extenſively introduced, being found extremely convenient for family ſettlements and mortgages.

2 Bl. Com. 142

Bac. Abr. tit. Leaſes.

2 Bl. Com. 142.

Bac. Abr. tit. Leaſes.

But though, at this day, terms for years are multiplied to a much longer duration than they were formerly, and there is ample remedy to recover the term itſelf, yet the ſucceſſion continues the ſame: for beſides the reaſon already given, it would be inconvenient to have had one rule of property for ſhort terms, and another for thoſe that were longer, being all of the ſame nature, and ſtill no more than leaſes for years. The difficulty, alſo, of fixing the juſt bounds to any preciſe determinate number of years occurs, ſince one or two years, more or leſs, would have made very little difference in reaſon, were the bounds affixed to leaſes of never ſo long a continuance; and long or ſhort are only terms of compariſon, as a leaſe for forty years is long with reſpect to one of eight or ten years, and yet ſhort with reſpect to another of a hundred years: therefore, that there might be an uniformity in the law, all leaſes for years are held to be of leſs value than eſtates for life, as being originally of much ſhorter duration; and alſo becauſe they were under the power of the tenant of the freehold to deſtroy, and therefore are conſidered only as chattels, and caſt upon the executor.

A Leaſe, what.

Shep. Touch. 267, 268.

2 Bl. Com. 317.

A leaſe for years, then, is a contract between the leſſor and leſſee for the poſſeſſion and profits of lands or tenements, &c. on the one ſide, and a recompence for rent, or other income on the other. More particularly; a leaſe is a ſpecies of conveyance, and properly ſignifies a demiſe, or letting of lands or tenements, rent, common, or any hereditament, whether corporeal or incorporeal, unto another, for a leſſer time than he that lets it has in it: for if it be for the whole intereſt, it is more properly an aſſignment than a leaſe. The party letting, or demiſing the premiſes is called the leſſor, or (in common ſpeech) the landlord, and the party to whom they are let or demiſed is called the leſſee or tenant. The very definition of a leaſe is, a contract between landlord and tenant, by which both are bound in mutual ſtipulations.

Shep. Touch. 267.

Regularly, theſe things muſt concur in the making of every good leaſe. 1. As in other grants, ſo in this, there muſt be a leſſor, and he muſt be a perſon able, and not reſtrained, to make that leaſe. 2. There muſt be a leſſee,

and

and he must be capable of the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demisable. 4. If the thing demised be not grantable without a deed, or the party demising be not able to grant without a deed, the lease must be made by deed; and if so, then there must be a sufficient description and setting forth of the person of the lessor, lessee, and the thing leased; and all necessary circumstances, as sealing, delivery, &c. required in other grants, must be observed. 5. If it be a lease for years, it must have a certain commencement, at least then when it comes to take effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent, precedent by matter *ex post facto*, and then the contingent must happen before the death of the lessor or lessee. 6. There must be all needful ceremonies, as livery of seisin, attornment, and the like, in all cases, where they are requisite. 7. There must be an acceptance of the thing demised and of the estate, by the lessee. But whether any part be reserved upon a lease for life, years, or at will, or not, is immaterial; except only in the cases of leases made by tenant in tail, husband and wife, and ecclesiastical persons: of which hereafter.

By what words made.

The usual words, whereby a lease is made, are "demise, "grant, and to farm let," and whatsoever words amount to a grant may serve to make a lease. Farm, ferme, fearme, *firma*, is derived of the *Saxon* word "feorman" to feed, or relieve; because in antient time, they reserved upon their leases, cattle and other victual and provision for their sustenance, so that a farmer, *firmarius*, was one who held his lands upon payment of a rent or feorme, though at present, by a gradual departure from the original sense, the word "farm" is brought to signify the very estate or lands so holden upon farm or rent: and this word "farm," in a will is sufficient to pass a leasehold estate, if it appear to have been the testator's intention that it should so pass.

Co. Lit. 45. ibid 5. 2 Bl. Com. 318.

6 T. R. 345.

Here, it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the

Bac. Abr. tit. Leases.

other come into it, for ſuch a determinate time, whether they run in the form of a licence, covenant, or agreement, are of themſelves ſufficient, and will, in conſtruction of law, amount to a leaſe for years as effectually as if the moſt proper and pertinent words had been made uſe of for that purpoſe: and on the contrary, if the moſt proper and authentic form of words, whereby to deſcribe and paſs a preſent leaſe for years are made uſe of, yet if upon the whole deed there appears no ſuch intent, but that they are only preparatory and relative to a future leaſe to be made, the law will rather do violence to the words, than break through the intent of the parties: for a leaſe for years being no other than a contract for the poſſeſſion and profits of the lands on the one ſide, and a recompence of rent or other income on the other, if the words there made uſe of are ſufficient to prove ſuch a contract, in what form ſoever they are introduced or howſoever variouſly applicable, the law calls in the intent of the parties, and models and governs the words accordingly.

Co. Lit. 301. *b.* 4 Bur. 2209. 1 Mod. 14. 11 Mod. 42. 1 Ld. Raym. 404. 2 Salk. 223. Bac. Abr. tit. Leaſes.

Thus the word "*dedi*" is ſaid to be a ſufficient word to make a leaſe for years.

So, a licence to inhabit amounts to a leaſe.

If therefore one "licence" another to enjoy ſuch a houſe or land from ſuch a time to ſuch a time, it is a leaſe; for it is a certain preſent intereſt, and ought to be pleaded as a leaſe: it may, however, be pleaded as a licence; and if it be pleaded as a leaſe for years and traverſed, the leſſee may give the licence in evidence to prove it.

Cro. Jac. 91.

The words "covenant, grant, and agree" that A ſhall have the lands for ſo many years, are apt words to make a leaſe for years, and enure as a leaſe.

2 Mod. 80.

The word "covenant" will make a leaſe, though the words "grant, and agree" be omitted.

3 Bur. 1446.

So, a covenant "to ſtand ſeiſed" entered into by the owner, is a leaſe.

12 Mod. 1. 1 Co. Litt. 37.

Covenant and entry amount to a leaſe: but a leaſe merely does not veſt the eſtate in the leſſor, but only gives him a right to enter and poſſeſs it: and therefore the eſtate is not veſted in him till actual entry.

5 T. R. 165.

Theſe words in an inſtrument, "be it remembered that "*A. B.*

"*A. B.* hath let and by theſe preſents doth demiſe, *&c.*" were held to operate as a preſent demiſe; although the inſtrument contained a further covenant for a future leaſe.

So, when one by articles, covenants, grants, and agrees with, *J. S.* that he ſhall have ſuch lands, or have, hold, and enjoy ſuch *lands* for ſo many years, theſe words are ſufficient to ſhew a preſent contract for the leſſee's enjoyment of theſe lands, and therefore amount to a preſent leaſe of them as effectually as if there had been the words *demiſit*, *locavit*, or ſuch like; and though there were in the ſame articles a covenant to make a good and perfect leaſe, as counſel ſhould adviſe, yet that would not prevent or deſtroy the operation of the firſt words as a preſent leaſe, ſuch covenant only being *in majorem cautelam*, that the leſſee might require further aſſurance by fine, or the like, if he found it neceſſary. The difference is, where ſuch articles by way of covenant, are made by him who is owner of the lands, and where they are made by a ſtranger, or one who has then nothing in the lands: in the firſt caſe they amount to a preſent and abſolute leaſe; but not in the other, becauſe a man cannot be ſuppoſed to leaſe what he has not; or if it might be ſo ſuppoſed, yet when it appears in the very articles that he has nothing in the lands, his covenant then can have no other conſtruction, but that he will procure the owner of the lands to permit the covenantee to hold and enjoy thoſe lands; which is the proper and natural interpretation of the words of the covenant, when he himſelf has nothing whereof to make a leaſe. Cro. Jac. 172, 301. Cro. Car. 207.

It is, indeed, ſettled, that words in an agreement "that "*A* ſhall hold and enjoy, &c." if not accompanied by reſtraining words, operate as words of preſent demiſe. 5 T. R. 163.

A deed that the perſon ſhall "hold and enjoy the pre- "miſes from ſeven years to ſeven years, for and during the "term of forty-nine years," with a proviſo "that it ſhall "be void on payment of ſo much money" though intended only as a collateral ſecurity, amounts to a preſent leaſe. Cro. Jac. 172. 2 Mod. 80.

One made his will in this manner: "I have made a leaſe "to *J. S.* for term of twenty-one years, paying but 20*s.* "rent;" this was held a good leaſe, or demiſe by will, for twenty-one years; and that the word "have" ſhould be Bac. on Leaſes 163.

taken in the preſent tenſe, as *dedi* is in a deed of feoffment, to comply with the intent of the teſtator.

2 Cro. Eliz. 190. A deviſe of "the iſſues and profits" of land, paſſes the land itſelf; for to have the iſſues and profits and to have the land is all one. [*Quære*, Would not it be the ſame of a leaſe by ſuch words, as they would be tantamount to "enjoy," eſpecially if a rent were reſerved?]

Co. Lit. 4. *b*. So, if a grant be made of a boilery of ſalt, the land paſſes, for that is the whole profit.

Any one may now leaſe or convey his land, and reſerve to himſelf the right of entering to kill game without being ſubject to be ſued as a treſpaſſer.

2 T. R. 703. It may be neceſſary, however, to put a different conſtruction on leaſes made in populous cities from that on thoſe made in the country. It is known, for example, that in the metropolis different perſons have ſeveral freeholds over the ſame ſpot (as in the caſe of the *Adelphi*;) different parts of the ſame houſe are let out to different people; ſuch is the caſe in the inns of court. It would therefore be very extraordinary to contend that if a perſon purchaſed a ſet of chambers, then leaſed them, and afterwards purchaſed another ſet under them, the after-purchaſed chambers would paſs under the leaſe.

2 T. R. 704. Where there is a conveyance in general terms of all that acre called *Black-acre*, every thing which belongs to *Black-acre* paſſes with it: but whether parcel or not of the thing demiſed is always matter of evidence.

Cro. Eliz. 486. 385 Cro. Car. 207. S. P. Articles by which "it is covenanted and agreed that *A.* "doth let the ſaid lands, &c." amount to an immediate leaſe; and a *proviſo* that the leſſee "ſhall pay to the ſaid "*A.* annually, &c." is a good reſervation of rent, and not a condition: one of the judges, however, held it to be a reſervation and a condition alſo; as in another caſe, where a *proviſo* joined with words of covenant made it a condition and a covenant alſo.

2 Bl. Rep 973. So, an agreement to grant a leaſe, whereby the leſſor did let and ſet for twenty-one years from a future day, ſhall be a leaſe *in præſenti*, if the circumſtances ſhew the party's intent ſo to be.

But although no ſpecific words are neceſſary to create a leaſe,

leaſe, yet there muſt be words uſed which ſhew an intention to demiſe.

Therefore, where a leſſee of tithes agreed with the owner of lands, for certain collateral conſiderations, not to take tithes in kind from the tenants of their lands for twelve years, but to accept a reaſonable compoſition not exceeding 3*s.* 6*d.* per acre; this was adjudged to be no leaſe: for 1ſt, the rent affected to be reſerved is uncertain; under this agreement it is at the option of the party either to pay tithes in kind, or to tender the reaſonable value of the tithes, which may be under 3*s.* 6*d.* per acre; 2dly, the owner of the lands, the perſon with whom the agreement is made, is neither to enjoy any thing nor pay any rent; it cannot, therefore, be a demiſe to him; the tenants are not parties or privy to the tranſaction, it cannot therefore be a demiſe to them. It can, at the utmoſt, amount to no more than a mere covenant with *A.* that *B.* ſhall enjoy, and creates no leaſe to either. Anſtr. 413.

So, where articles were drawn between *A.* and *B.* in this manner: Articles agreed upon, *&c. Imprimis*, *A.* doth demiſe ſuch a cloſe to *B.* to have it for forty years, and a rent reſerved with a clauſe of diſtreſs, *&c.* In witneſs whereof, *&c.* and afterwards was written on the ſame paper a memorandum, that theſe articles are ordered by counſel of both parties, according to the due form of law: here, becauſe the intent of both parties appeared by that memorandum, and by a leaſe actually drawn by counſel, but never ſealed, (upon ſome diſagreement between the parties,) it was ruled by the court, upon evidence in ejectment, that theſe articles were not a ſufficient leaſe, and the jury found accordingly. Bac. Abr. tit. Leaſes (K.)

So, where one made a leaſe for life *& proviſum eſt*, that if the leſſee die within ſixty years, then his executors and aſſigns ſhould enjoy the land in his right for ſo many years as ſhould be behind of the ſixty years from the date of the leaſe: this was held to be only a covenant, and no leaſe; for which divers reaſons are aſſigned in the books; the beſt however ſeems to be, that he having in the firſt part of the deed made a leaſe in expreſs and proper words, muſt be ſuppoſed to mean ſomething leſs in the laſt part of the deed, which *Ibid.*

which varies ſo widely in the form of expreſſion, and which has a natural and proper meaning of its own as a covenant, but cannot amount or come up to a leaſe, without violence and force done to the words, as well as the intent of the parties. This ſeems the more probable, becauſe it is held clearly, that if it had been provided that if the leſſor die within ſixty years, that then he demiſed the land to another (who was alſo a party to the deed) for ſo many of the ſixty years as ſhould be then to come, this would be a good leaſe; for here he comes into the very ſame form of expreſſion made uſe of in the firſt part of the deed, which was an actual demiſe, and therefore muſt be ſuppoſed to mean the ſame thing in the latter part too, and conſequently ſuch words would make it an actual demiſe.

Cro. Jac. 172. In one caſe it is ſaid, that though a grant "to have and "to hold" land for years be a good leaſe, yet a grant to "enjoy" lands in the ſame manner is but a covenant: [but unleſs it be with reference to a ſtranger, it is conceived that this opinion is erroneous, if the caſe itſelf be rightly reported.]

Com. Dig. tit. Eſtates (G. 1.) For, a covenant "that a ſtranger ſhall enjoy ſuch land "for ſo many years at ſuch a rent," does not amount to a leaſe, but a covenant.

Ibid. It is ſaid alſo, that a covenant "that he ſhall permit the "covenantee himſelf to hold the land for ſo many years," does not amount to a leaſe; for it founds only in covenant: [but this ſeems doubtful at this day, not merely becauſe a licence to inhabit amounts to a leaſe, but becauſe the intention of the parties clearly is that the one grants and the other accepts a leaſe.]

Ibid. An article "that he is content *A.* ſhall have a leaſe for "ſix years, that the rent ſhall be 10*l.*" does not amount to a leaſe; for it appears to be only inſtructions for a leaſe.

Cro. Eliz. 156. So, "I agree to let my land," this is no leaſe.

Ibid. 173. So, an agreement or covenant made between *A.* and *B.* that *C.* ſhall have ſuch land for years; this being made between ſtrangers, cannot amount to a leaſe.

Ibid. So, if *A.* covenants with *B.* that his executors ſhall have ſuch land for twenty-one years, this cannot amount to a leaſe.

If

If a man have a leaſe for years of land, and he reciting this, by the premiſſes of the deed grants all his eſtate in the land, to have and to hold the land or the term after his death, or for part of the time only; in this caſe the *habendum* is void, and the whole eſtate paſſes immediately by the premiſſes. Shep. Touch. 114. 2 Salk. 346. S.P.

Where there is a demiſe of premiſſes, and an entire rent reſerved, if any part of the premiſſes could not legally be demiſed, the whole is void. Eſp. R. 78.

A Leaſe; how made.

A leaſe may be made, either, 1. by deed; 2. by writing without deed; or 3. by parol demiſe.

Of a Leaſe by Deed.

A leaſe by deed indented conſiſts of the following parts: 1. the premiſes; 2. the *habendum et tenendum*; 3. the *reddendum*, or reſervation; 4. covenants; and 5. proviſos or conditions. *Parts of ſuch Leaſe.*

The premiſes of a leaſe are all the parts that precede the *habendum*. The office of this part of the leaſe is rightly to name the leſſor and leſſee, and to comprehend the certainty of the thing demiſed, either by expreſs words, or by that which by reference may be reduced to a certainty; and the exception, or thing excepted, if there be any. The recital, alſo, if there be any, is for the moſt part contained in the premiſes. Shep. Touch. 75.

A leaſe to one for life *habendum* to his three ſons ſucceſſively, but omitting to mention the ſons in the premiſes of the deed, was held to be for the life of the father only, and that the ſons ſhould not take in poſſeſſion or by way of remainder: for it being limited to the father for his life, that was a greater eſtate than for the lives of others; and the three ſons were named as perſons to have an eſtate, and not to make a limitation of an eſtate. Cro. Eliz. 58.

The premiſes ought to comprehend the certainty of the lands and tenements demiſed. Land is *nomen generaliſſimum*, and comprehends all the ſpecies of lands: and a nominal manor will paſs under the general words, meſſuages, lands, tenements, and hereditaments. If the thing deſcribed be ſufficiently aſcertained, it is ſufficient, though all Co. Lit. 64. 3 Atk. 82. Com. Dig. tit. Fait. (E. 4.)

all the particulars are not true; as if a man demiſes his meadows in *B.* and *D.* containing ten acres, whereas they contain twenty acres, all the meadows paſs.

Shep.Touch.75. Com. Dig. tit. Fait. (E. 9.)

The *habendum et tenendum* is that part of the leaſe which begins with "to have and to hold," and properly ſucceeds the premiſes. The office of the *habendum* is to name the leſſee, and to limit the certainty of the eſtate. It may alſo abridge or alter the generality of the premiſes. The *tenendum* was formerly uſed to denote the lord of whom and the tenure by which the eſtate was to be holden, which has long been unneceſſary: it is retained merely by cuſtom.

Shep.Touch.77.

An exception is a clauſe in a deed, whereby the leſſor excepts ſomething out of that which he has granted before by the deed: and being the act and words of the leſſor, ſhall be taken *ſtrictè* againſt him. In every good exception, theſe things muſt always concur; 1. the exception muſt be by apt words, as "ſaving and excepting," *&c.* 2. it muſt be of part of the thing demiſed, and not of ſome other thing; 3. it muſt be part of the thing only, and not of all, the greater part, or the effect of the thing granted: an exception, therefore, in a leaſe, which extends to the whole thing demiſed, is void; 4. it muſt be of ſuch a thing as is ſeverable from the premiſſes demiſed, and not of an inſeparable incident; 5. it muſt be of ſuch a thing as he that doth except may have, and which properly belongs to him. It muſt be of a particular thing out of a general, and not of a particular thing out of a particular thing; 6. it muſt be certainly deſcribed and ſet down: therefore, if one demiſe a manor excepting one acre, without ſetting forth which, or what acre it ſhall be, the exception is void.

Cro. Eliz. 6.

Shep.Touch.80.

The *reddendum* or reſervation is a clauſe in the leaſe, whereby the leſſor reſerves ſome new thing to himſelf out of that which he granted before: and this commonly and properly ſucceeds the *tenendum*, and is uſually made by the words "yielding and paying," and ſuch like. In every good reſervation, theſe things muſt always concur: 1. it muſt be by apt words; 2. it muſt be of ſome other thing iſſuing or coming out of the thing granted, and not a part of the thing itſelf, nor of ſome thing iſſuing out of another thing; 3. it

3. it must be of such a thing whereunto the grantor may have *resort* to distrain; 4. it must be made to one of the grantors, and not to a stranger to the deed.

A covenant is a clause of agreement contained in the lease, whereby either party is bound to do, perform, or give something to the other.

A condition, or proviso, is a clause of restraint in the lease, which is commonly expressed by the words "provided," or "provided always," or words similar. Co. Lit. 35.

A lease by deed, like any other deed, must be written, (or, it is presumed printed; for it may be in any character or language); but it cannot be upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing (or printing) upon them can be least vitiated, altered, or corrupted. It must also have the regular stamps imposed on it by the several statutes for the encrease of the public revenue: of which see hereafter. 2 Bl. Com. 297.

Formalities requisite.

It is requisite that the respective parties, the lessor and lessee, whose deed the lease is, should seal, and now in almost every case, *sign it also*: an instrument not under seal, is no deed; for a seal *is* essential to a deed. The use of seals as a mark of authenticity to letters and other instruments in writing, is extremely antient. The method of our Saxon ancestors was for such as could write to subscribe their names, and whether they could write or not, to affix the sign of the cross, which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. [Lord *Hardwicke* calls such *mark-men*. 3 *Atk.* 389.] This neglect of signing, and custom of resting only on the authority of seals, remained very long among us; for it was held, in all our books, that sealing alone was sufficient to authenticate a deed. The common form of attesting deeds, "sealed and delivered," continues in great measure to this day; notwithstanding that the statute 29 *C.* 2. *c.* 3. commonly called "The statute of "Frauds and Perjuries," revives the Saxon custom, and expressly directs the signing in all grants of lands and many other species of deeds: in which, therefore, signing seems 2 T. R. 695. 2 Bl. Com. 297.

to

to be now as neceſſary as ſealing, though it has ſometimes been held that the one includes the other.

Co. Lit. 36. 2 Bl. Com. 307. The leaſe muſt alſo be delivered, either by the parties themſelves, or their certain attorney or attornies, which delivery is alſo expreſſed in their atteſtation "ſealed and "*delivered.*" Almoſt any manifeſtation, however, of the party's intention to deliver, if accompanied by an act importing the ſame, will conſtitute a delivery. If the date be falſe or impoſſible, the delivery aſcertains the time of it. If another perſon ſeals the deed, yet if the party delivers it himſelf, he thereby adopts the ſealing, and, by a parity of reaſon, the ſigning alſo, and makes them both his own. Every deed ſhall be intended to be delivered on the day it bears date, unleſs the contrary be proved.

The laſt requiſite is the atteſtation or execution of the leaſe in the preſence of witneſſes, though this is neceſſary rather for the preſervation of the evidence, than to conſtitute the eſſence of the deed. Ever ſince the reign of Henry VIII. the witneſſes have uſually ſubſcribed their atteſtation, either at the bottom or on the back of the deed: but ſuch actual ſubſcription by the witneſſes is not required by law, though it is prudent for them ſo to do in order to aſſiſt their memory when living, and to ſupply their evidence when dead. A ſubſcribing witneſs to any inſtrument may

10 Mod. 333. 1 Str. 1. S. C. Cowp. 845. Bull. N. P. 284. be compelled to give evidence reſpecting it: for the perſon by ſubſcribing his name as a witneſs, undertakes to give evidence at a proper time and in a proper manner.

2 Bl. Com. 308. A leaſe by deed may be avoided or rendered of no effect, if it wants either 1. proper parties and a proper ſubject matter; 2. writing (or printing) on paper or parchment duly ſtamped; 3. ſufficient and legal words properly diſpoſed; 4. reading, if deſired, before the execution; 5. ſealing, and, by the ſtatute of Frauds, in moſt caſes, ſigning alſo; or 6. delivery. Without theſe eſſentials,

Cro. Car. 399. Bull. N. P. 267. it is void *ab initio.* It may alſo be avoided by matter *ex poſt facto*: as 1. By eraſure, interlineation, or other alteration in any material part. If a deed be altered by a ſtranger, in a point not material, this does not avoid the deed; but otherwiſe, if it be altered by a ſtranger in a point material,

material, for the witneſſes cannot prove it to be the act of the party, where there is any material difference: an immaterial alteration, however, does not change the deed, and conſequently the witneſſes may atteſt it without danger of perjury. But if the deed be altered by the party himſelf, though in a point not material, yet it avoids it, [unleſs a memorandum thereof be made at the time of the execution and atteſtation. 2 *Bl. Com.* 308.] for the law takes every man's act moſt ſtrongly againſt himſelf. So, if there be ſeveral covenants in a deed, and one of them be altered, this deſtroys the whole deed; for it cannot be the ſame, unleſs every covenant of which it conſiſts be the ſame alſo. 2. By breaking off, or defacing the ſeal. 3. By delivering it up to be cancelled; that is, to have lines drawn over it in the form of lattice work or *cancelli*, though the phraſe is now uſed figuratively for any manner of obliterating or defacing it. 4. By the diſagreement of ſuch whoſe concurrence is neceſſary in order for the deed to ſtand: as the huſband where a feme-covert is concerned; an infant, or a perſon under dureſs, when thoſe diſabilities are removed; and the like. 5. By the judgment or decree of a court of judicature. This was antiently the province of the court of Star Chamber, and now is that of the court of Chancery; and is exerciſed when it appears that the deed was obtained by fraud, force, or other foul practice, or is proved to be an abſolute forgery; in any of which caſes, the deed may be avoided either in part, or totally, according as the cauſe of avoidance is more or leſs extenſive.

2 Bl. Com. 308.

ibid. 309.

If a deed begin "This indenture witneſſeth," &c. and in truth the parchment or paper is not indented, this is no indenture, becauſe the words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

Co. Lit. 229.

All the parts of an indenture make but one deed, and each part is of as great force and effect as all the parts together: ſo they are eſteemed the mutual acts of the reſpective parties, each of whom may be bound by either party of the ſame,

ſame, for the words of the indenture are the words of each party.

A deed-poll is ſaid to be a deed teſtifying that only one of the parties to the agreement hath put his ſeal to the ſame, where ſuch party is the principal or only perſon whoſe conſent or act is neceſſary to the deed: it is therefore a plain deed without indenting, and is uſed when the vendor, for example, only ſeals, and there is no need of the vendee's ſealing a counter-part, becauſe the nature of the contract is ſuch as to require no covenant from the vendee.

Every deed that is pleaded ſhall be intended to be a deed-poll, unleſs it be alledged to be indented. A deed-poll is the ſole deed of him that makes it; and the words thereof ſhall be ſaid to be his words, and bind him only.

2 Eſp. R. 158. The leaſe need not be proved in an action of debt for the performance of covenants therein, judgment and ſuggeſtion of damages to be aſſeſſed on the writ of enquiry; for the party is eſtopped to ſay that the leaſe was not duly executed.

Cro. Eliz. 658. Whenever a leaſe is pleaded as an indenture, it muſt be ſo alledged.

1 Eſp. R. 89. A party who has executed a leaſe ſhall not be permitted to acknowledge it; but it muſt be proved by the ſubſcribing witneſs.

Of a Leaſe by Writing without Deed.

2 Wilſ. 26. A leaſe for a term of years may be created by writing without deed. The ſtatute 29 *Car.* 2. *c.* 3. *ſ.* 3. enacts, that "No leaſes, eſtates, or intereſts either of freehold or term of years, or any uncertain intereſt (not being copyhold or cuſtomary intereſt) of, in, to, or out of any meſſuages, &c. ſhall be aſſigned, granted, or ſurrendered, unleſs by deed or *note in writing*, ſigned by the party ſo aſſigning, granting, or ſurrendering the ſame, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

5 Bur. 2827. In the caſe of *Fry* and *Philips*, one *Jones* granted a leaſe for 99 years, if three perſons ſhould ſo long live. The executrix of the grantee aſſigned to one *Peninton* by indorſement on the leaſe in theſe words, "I aſſign all my title, &c, "to Mr. *Thomas Peninton* for ſix guineas;" which writing was

was neither ſealed, delivered, nor ſtamped. *Peninton* entered, and exactly in the ſame manner aſſigned to one *Fry*, who entered and was poſſeſſed; but in 1756 gave up the poſſeſſion. The executrix of the grantee was then dead. Her executor had never entered or done any act of ownerſhip; but in 1770 he regularly aſſigned to *Fry:* at that time, however, *Philips* was in poſſeſſion under a grant from *Jones*, made by him on *Fry* giving up the poſſeſſion: The queſtion for the opinion of the court was, "Whether any "thing paſſed to *Fry* by the laſt aſſignment made to him by "the executor of the executrix of the grantee, which exe- "cutor himſelf never was in poſſeſſion?" which queſtion the court did not determine; becauſe, upon the whole of the caſe, *Fry* had a right. Lord *Mansfield* told the counſel that a point had occurred to the court which had not been mentioned in the argument. If the indorſement by the executrix carried a legal intereſt in the term to *Peninton*, from *Elizabeth French*, and *Peninton*'s indorſement to *Fry* had a like effect, then *Fry* had the whole leaſe in him; and by the ſtatute of Frauds, 29, *C.* 2. *c.* 3. *s.* 3. it may be aſſigned by a *note in writing*; and ſuch a note in writing need not be either ſealed, delivered, or ſtamped, as a deed muſt. His Lordſhip mentioned a caſe in the Common Pleas, *Trinity* term, 1755, between *Farmer* and *Rogers*, in which it was reſolved, "that by the ſtatute of Frauds and Perjuries a leaſe for any term of years may be created by *writing without deed*, and that the ſame may be ſurrendered by deed or note in writing: and the court held that there was no occaſion for any ſtamp duty upon the note or indorſement, it not being by deed: [which however is now rendered neceſſary, it ſhould ſeem, by ſtat. 23 *G.* 3. *c.* 58.] So, in the preſent caſe, the legal intereſt in this term might be aſſigned by a note in writing. Mr. Juſtice *Aſton* was of the ſame opinion. *Elizabeth French*, by writing under her hand, indorſed on the back of the indenture, aſſigned to *Peninton*. This writing was neither ſealed, delivered, nor ſtamped. *Peninton* entered and then aſſigned in the ſame manner to *Fry*. The executor of *Elizabeth French* had nothing to convey.—Lord *Mansfield*. The court muſt take

the whole of what is ſtated in the caſe, and upon the whole of the caſe the plaintiff has a right.

Of a Leaſe by Parol Demiſe.

A leaſe may likewiſe be made by parol demiſe, or verbal contract: with reſpect to which, by the before-mentioned ſtatute, 29 *C.* 2. *c.* 3. commonly called The Statute of Frauds and Perjuries, ſeveral things muſt be evidenced by writing, of which, before that ſtatute, parol evidence had been ſufficient.

By that ſtatute, all leaſes, eſtates of freehold, or term of years, created by parol and not put into writing and ſigned by the parties making the ſame, or their agents thereunto lawfully authorized by writing, ſhall have the effect of eſtates at will only; except leaſes not exceeding three years from the making, whereupon the rent reſerved amounts to two thirds of the improved value; and no ſuch eſtate or intereſt ſhall be granted or ſurrendered but by deed, or note in writing.

8 T. R. 3.
3 T. R. 16.
4 T. R. 680.

The meaning of the ſtatute was, that ſuch an agreement ſhould not operate as a term. A parol agreement, therefore, to leaſe lands for four years, creates only a tenancy at will: but what was conſidered as a tenancy at will at the time when the act paſſed, has been ſince properly conſtrued to enure as a tenancy from year to year.

2 Bl. Rep. 1171.

So, a general parol demiſe at an annual rent, where the bulk of the farm is encloſed, and a ſmall part of it lies in the open common fields, is only a leaſe from year to year, and not for ſo long as the uſual courſe of huſbandry extends.

12 Mod. 610.
2 Ld. Raym. 736.
Bull. N. P. 177.
1 Str. 654.

A leaſe for three years, to commence *in futuro* by parol, is not warranted by the ſtatute of Frauds.

But a leaſe by parol for a year and a half, to commence after the expiration of a leaſe which wants a year of expiring, is a good leaſe within the ſtatute; for it does not exceed three years from the making.

Bull. N. P 84,
Cro. Eliz. 775.

If land be leaſed to *A* for a year, and ſo from year to year as long as both parties ſhall agree, this is a leaſe for two years certain; and if the leſſee hold on after two years, he is not a leſſee at will, (as the old opinion was) but for a year

year certain: for his holding on is an agreement to the original contract; and ſuch executory contract is not void by the ſtatute of *Frauds*, for there is no term for above two years ever ſubſiſting at the ſame time. But if the original contract were only for a year at 8l. *per ann.* rent, without mentioning any time certain, it would be a tenancy at will after the expiration of the year; unleſs there were ſome evidence, by a regular payment of rent annually, or half yearly, that the intent of the parties was that he ſhould be tenant for a year.

If a landlord leaſe for ſeven years by parol, though the leaſe be void by the ſtatute of Frauds, as to the duration of the term, the tenant holds under the terms of the leaſe in other reſpects, as to the rent, the time of the year when the tenant is to quit, *&c.* 5 T. R. 471.

So, where the tenant holds over after the expiration of his term without having entered into any new contract, he holds upon the former terms. *Ibid.*

If one ſay to me, "You ſhall have a leaſe of my lands in *D.* for twenty-one years, paying thereof ten ſhillings *per ann.* make a leaſe in writing and I will ſeal it," this was agreed to be a good leaſe by parol, being before the ſtatute. Cro. Eliz. 33.

SECTION II. *Of regiſtering Leaſes.*

THE *regiſtry of deeds* has been rendered neceſſary in particular parts of the kingdom, by certain ſtatutes paſſed at various periods of time, in order to prevent the frauds which were practiſed by means of ſecret transfers and prior mortgages.

The ſtatute 2 & 3 *Ann.* c. 4, enacts, that a memorial of all deeds and conveyances made and executed in the Weſt-Riding of the county of *York*, after *September* 29, 1704; whereby any honors, manors, lands, &c. may be any way affected in law or equity, may, at the election of the party or parties concerned, be regiſtered in an office to be kept at *Wakefield*, in the ſaid Riding, for that purpoſe; which memorial muſt be written and directed to the Regiſter of the ſaid office; and muſt be under the hand and ſeal of ſome or one of the grantors, or grantees, his or their guardians or

truſtees, atteſted by two witneſſes, one whereof to be one of the witneſſes to the execution of ſuch deed or conveyance; which witneſs ſhall, upon oath before the ſaid regiſter or his deputy, prove the ſigning and ſealing of the ſaid memorial, and the execution of the deed or conveyance therein mentioned; and that every ſuch memorial ſhall contain the date of ſuch deed or conveyance, and the names and additions of all the parties thereto, with the places of their abode; and ſhall alſo mention the honors, manors, lands, *&c.* contained in ſuch deed, *&c.* and the names of the pariſhes, *&c.* wherein they are ſituated: every deed or conveyance that ſhall, at any time after ſuch memorial is ſo regiſtered, be made and executed of the honors, manors, lands, *&c.* or any part thereof contained in ſuch memorial, ſhall be adjudged fraudulent and void againſt any ſubſequent purchaſer or mortgagee for valuable conſideration; unleſs ſuch memorial thereof ſhall be regiſtered as the act requires, before the regiſtering of the memorial of the deed or conveyance under which ſuch ſubſequent purchaſer or mortgagee ſhall claim.

The ſtatute 6 *Ann. c.* 35. contains proviſions of a ſimilar nature with reſpect to the Eaſt Riding of the ſame county, and the town of *Kingſton-upon-Hull*, and appoints the Regiſter-office to be kept in *Beverley*, in the ſaid Riding.

The ſtatute 8 *G.* 2. *c.* 6. contains proviſions of a ſimilar nature with reſpect to the North Riding of the ſame county.

The ſtatute 7 *Ann. c.* 20. contains proviſions of a ſimilar nature, with reſpect to the county of *Middleſex*. The Maſter of the *King's Bench* to be the Regiſter who may appoint a deputy, both of them to be under the controul of the *Lord Chancellor*, by whom rules may be made for the management of the office, which is to be kept in or near the Inns of Court, or Chancery. The Regiſters to endorſe a probate of every deed ſo regiſtered, which certificate ſhall be allowed as evidence of ſuch regiſtry in all courts of record whatſoever. Upon certificate and proof made to the regiſter that money due on a mortgage entered in the regiſtry has been ſatisfied, the Regiſter ſhall make an entry thereof in the margent againſt the enrollment.

By

By ſtatute 25 *G.* 2. *c.* 4. the deputy of the chief clerk of the *King's Bench*, is appointed a Regiſter for *Middleſex*, inſtead of the chief clerk.

By theſe ſtatutes, deeds, conveyances, and deviſes by will ſhall be void againſt ſubſequent purchaſers and mortgagees, unleſs regiſtered before the conveyances under which they claim; alſo, no judgment, ſtatute, or recognizance, ſhall bind any lands in thoſe counties, but from the time a memorial thereof ſhall be entered at the Regiſter-office. But the acts do not extend to copyhold eſtates, leaſes at a rack-rent, or to any leaſes, not exceeding twenty-one years, where the poſſeſſion goes with the leaſe; nor to any chambers in the inns of court.

Regiſtering an aſſignment is not regiſtering the leaſe. 2 Str. 1064.
Therefore, where the defendant claimed under a leaſe made in 1730, which was ſoon after mortgaged, and in 1731, ſold out and out to the defendant; the original leaſe was not regiſtered, but the firſt mortgage of it, and the defendant's purchaſe were: and it not being a leaſe at rack-rent, the queſtion was, whether this was a regiſtry within the meaning of 7 *Ann. c.* 20? and the Chief Juſtice *(Holt)* held it not to be ſufficient; for the act ſays, the deed under which the party claims, with the witneſſes names, ſhall be regiſtered; and of this a ſubſequent purchaſer can have no notice by the bare regiſtry of the aſſignment, and it is alſo required that the original be produced to the officer.

On a proviſo in a leaſe of lands of the Dutchy of *Lancaſter*, according to ſtat. 27. *H.* 8. *c.* 11. that it ſhould be enrolled with the auditor; the certificate of the auditor on the margin was held to be ſufficient evidence of the enrollment. Doug. 56.

CHAPTER II.

SECTION I. *Of Agreements for Leaſes and the Remedies thereon.*

SECTION II. *Of Stamps required to Leaſes, and Agreements.*

SECTION I. *Of Agreements for Leaſes, and the Remedies thereon.*

2 T. R. 735. A PAPER containing words of preſent contract, with an agreement that "the leſſee ſhall take poſſeſſion "immediately," and that "a leaſe ſhall be executed in "*futuro*," operates only as an agreement for a leaſe, and not as a leaſe itſelf.

2 T. R. 739. So, in reſpect to copyhold premiſſes, an inſtrument on an agreement ſtamp reciting that *A.* in caſe he ſhould be entitled to certain copyhold premiſſes on the death of *B.* would immediately demiſe the ſame to *C.* declaring "that he did "agree to demiſe and let the ſame," with a ſubſequent covenant to procure a licence to let from the lord, operates only as an agreement for a leaſe, and not as an abſolute demiſe.

5 T. R. 163. So, though words in an agreement, that "*A.* ſhall hold "and enjoy, *&c.*" if not accompanied by reſtraining words, operate as words of preſent demiſe, yet if they be followed by others which ſhew that the parties intended that there ſhould be a leaſe in future, they conſtitute merely an agreement for a leaſe; for the whole muſt depend, in this and ſimilar caſes, on the intention of the parties.

Cowp. 473. Where *A.* by agreement in writing, but not ſtamped, articled with *B.* to grant him a leaſe for twenty-one years, and *B.* entered and continued in poſſeſſion eighteen years, but no leaſe was ever tendered by *A.* or demanded by *B.* the agreement was held to be a good defence in an action of ejectment brought by *A.* This caſe, however, ſeems inconſiſtent

sistent with the principles upon which other cases similarly circumstanced have been ruled, and has indeed been since doubted. The rule certainly does not extend to the case of a purchaser. 1 Bro. R. 397.

The trustee of a term, for the benefit of creditors, not having notice of an agreement for a lease made previous to the grant of the term, has been permitted to maintain ejectment against the tenant in possession under the agreement, on the ground that the title of the tenant being only a doubtful equity, could not be set up against the legal title of the trustee. 1 T. R. 735

Chancery will enforce the performance of an agreement as if articles were to make a lease, *&c.* *Remedy in Equity.* Com. Dig. tit. Agreement. (2 C. 1.)

An agreement therefore, for a lease from a dean and chapter, executed by the dean for himself and chapter, though signed by him only, shall bind the chapter notwithstanding.—Dean and chapters for fear of incurring the penalties of the restraining statutes, (of which hereafter) have been careful of preserving the same description in their leases since, as they did before those statutes; and possibly at the time of the *old leases*, there might be barns, or ancient buildings, which, after such a length of time, must have been long since decayed and gone: the court therefore will not decree a specific performance of covenants for repairs; but will leave the party to their action at law for the non-performance; neither will they decree that a tenant in such case shall deliver up, at the expiration of his lease, the premisses with such buildings upon them, when there is not the least proof that they were in being at the making of the lease. 2 Atk. 44.

If an agreement be by *A. B.* and *C.* to make a lease, and it is executed by *A.* it shall be decreed that *B.* and *C.* who were the sons of *A.* shall execute it, though the agreement was by parol; for it was out of the statute. 1 Vern. 210.

With respect to *parol* agreements, it is an established rule, that a parol agreement, *part performed*, is not within the provisions of the statute of Frauds, but will be decreed to be executed by a court of equity; for where a part of the agreement is performed on one side, it is but common justice that it be carried into execution. 2 Bro. R. 566. 2 Atk. 100. 2 Str. 783.

Ambl. 586. Bro. R. 412. As to what acts amount to a part performance, the general rule is, that the acts muſt be ſuch as could be done with no other view or deſign than to perform the agreement, and not ſuch as are merely introductory or ancillary to it.

3 Atk. 4. Delivery of poſſeſſion or payment of money, therefore, is a part performance of an agreement not reduced into writing.

2 Ver. 113. 1 Atk. 12. Thus, upon an agreement for the ſurrender of a term where the leſſor accepts the key, he ſhall be bound to accept of the ſurrender.—But, though taking poſſeſſion, or ſuch other act in purſuance of an agreement, is ſufficient evidence to have the agreement decreed, yet the circumſtance of vendees ordering conveyances to be drawn in purſuance of a parol agreement, and going ſeveral times to ſee the premiſſes, and a letter from the vendor, mentioning the agreement, but not the price, will not induce the court to decree a performance; nor will ſending an appraiſer to value the thing agreed for.

1 Eq. Ca. Abr. 20.

Pre. Cha. 561. So, in another caſe, it is ſaid, that where a man on promiſe of a leaſe to be made to him, lays out money in improvements, he ſhall oblige the leſſor afterwards to execute a leaſe, becauſe it was executed on the part of the leſſee.

3 Bro. R. 149. Therefore, where a leſſor made a verbal promiſe to his leſſee, to ſecure him in the poſſeſſion of the premiſſes during the leſſee's life, in conſequence of which promiſe the leſſee made conſiderable alterations and improvements, and after the leſſor's death, a *memorandum* of this promiſe was found among his papers, wherein he expreſſed a hope that the ſame would be obſerved, Lord *Thurlow* held that the *memorandum* took the caſe out of the ſtatute of Frauds, and directed a leaſe to be made for ninety-nine years, determinable on his life.

1 Atk. 499. But the bare entry of a ſteward in his lord's contract book with his tenants, is not an evidence of itſelf that there is an agreement for a leaſe between the lord and one of the tenants, but muſt be ſupported by other proof.

2 Vern. 456. 1 Eq. Ca. Abr. 21. Plaintiff, purſuant to a parol agreement for a building leaſe of Wild-houſe, had proceeded to pull down part and build part. Before any leaſe executed, the owner of the ſoil died. The defendants, his repreſentatives, knew nothing

thing of the matter, and inſiſted on the ſtatute of Frauds. The Lord Keeper diſmiſſed the bill, but on an appeal to the Lords in Parliament, his diſmiſſion was reverſed, and a building leaſe decreed.

If there be a parol agreement for a leaſe for twenty-one years, and leſſee enter and enjoy for ſeveral (as for example, ſix) years, he ſhall not, upon a bill brought to compel him to execute a counterpart for the reſidue of the term, plead the ſtatute. 2 Str. 783.

Though the agreement be by parol, yet if it be agreed to be *reduced into writing*, and part of the agreement is executed, but the reducing of it into writing is prevented by fraud, it may be good. 1 Eq. Ca. Abr. 19.

Therefore, an agreement to aſſign a term and goods, and that it ſhould be put in writing, was decreed to be executed, it being part of the agreement, that it ſhould be put in writing, and part of the money having been paid. 2 Ch. la. 135, 6. 1 Vern. 151.

So, if a leaſe by *A.* to *B.* is agreed by parol, and drawn and ingroſſed by the counſel of *B.* and afterwards executed by *A.* it ſhall not be avoided by *B.* *Ibid.* 221, 2.

Bills were to have an execution of parol agreements touching leaſes of houſes, ſetting forth that in confidence of theſe agreements, the plaintiffs had expended great ſums about the premiſſes; and it was alledged, that it was agreed, that the agreements ſhould be reduced into writing: the defendant pleaded the ſtatute of Frauds. Lord *King* ſaid, that the difficulty was, that the act makes void the eſtate, but does not ſay that the agreement itſelf ſhall be void; and therefore, he thought, that if that ſubſiſted ſo as to entitle the party to damages at law, it might be decreed in equity, and directed that point to be tried; and ſaid, that afterwards he would conſider farther of it: but as to the improvements made, his Lordſhip was clearly of opinion, that for ſuch as were of uſe and neceſſity, and not merely for humour and fancy, the party was entitled to have ſatisfaction. 1 Eq. Ca. Abr. 20.

Where there is an agreement by parol, and part of it executed, equity will decree ſpecific execution of the whole; but where there is an agreement by writing executed, evidence cannot ſupply any defect in that agreement, which Rumb. 65. 9 Mod. 6.

was

was intended to be part of that agreement, but was not inſerted in it: [unleſs, as is conceived, in caſe of fraud.]

2 Vez. 293. Yet, if there is an agreement in writing for taking a houſe at 32 *l.* the owner to put it in repair, and afterwards a parol agreement for 40 *l.* the owner having rebuilt with the tenant's conſent, and the leſſee brings a bill for ſpecific performance of the written agreement, parol evidence may be given of the new agreement to rebut the equity prayed.

3 Atk. 388. So, if a bill is brought to carry into execution an agreement for the leaſe of a houſe, the defendant, the leſſor, ſhall be admitted to parol proof that the plaintiff, who wrote the agreement, omitted to make the rent (which was reduced to 9 *l.* inſtead of 14 *l.* the former rent,) payable, clear of all taxes.

2 Bro. R. 32. 1 Str. 426. 1 Atk. 12. *A letter* takes a parol agreement out of the ſtatute; but wherever a letter is relied on as evidence of an agreement, it muſt be ſtamped before it can be read; it muſt alſo furniſh the terms of the agreement, or muſt at leaſt refer to ſome written agreement in which the terms are ſet forth.

3 Atk. 503. There have been caſes where a letter written to a man's own agent, and ſetting forth the terms of an agreement as concluded by him, has been deemed to be a ſigning within the ſtatute, and agreeable to the proviſion of it.

Ibid. Therefore, where there was a complete agreement in writing, and a perſon who is a party, and knows the contents, ſubſcribes it as a witneſs only, he is bound by it, for it is a ſigning within the ſtatute of Frauds.—The meaning of that ſtatute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other; and therefore, both in courts of equity, and common-law, where an agreement has been reduced to ſuch a certainty, and the ſubſtance of the ſtatute can be complied with in the material part, the forms have never been inſiſted upon.

2 Vern. 231. If there be an agreement for a leaſe in the county of *N.* where the leſſor uſually repairs, at 30 *l. per ann.* without ſaying who ſhall repair, if it appear that the land is of greater value, it ſhall be decreed, that the leſſee ſhall take a leaſe and do the repairs, and pay 30 *l. per ann.* without deduction, except for taxes by parliament.

Articles of agreement may be rectified by the minutes.

The

The court will not relieve againſt a contract in writing, unleſs there is expreſs proof of the miſtake of the intention of the parties. 3 Vez. 327.

If therefore a bond is given with a penalty, a ſpecific performance ſhall not be decreed: for the party has relied upon the penalty. Ch. Ca. 188.

On a covenant to build, the leſſors are entitled to come into a court of equity for a ſpecific performance, but not on a covenant to repair. 3 Atk. 515. 3 Bro. R. 166.

Specific performance may be decreed againſt one become a lunatic ſince the agreement, if the legal eſtate is in truſtees. 1 Vez. 82.

In bills for ſpecific performance, the court never gives relief where the act is impoſſible to be done, but leaves the party to his remedy at law. 1 Atk. 573.

If an agreement be otherwiſe than certain, fair, and juſt in all its parts, the court will not decree a ſpecific performance. 3 Atk. 386.

The conſtant doctrine of the court is, that it is in their diſcretion whether they *will* decree a ſpecific performance, or leave the plaintiff to his remedy at law. *Ibid.* 389.

If either of the parties to an agreement for a leaſe refuſe to perform the ſtipulations which it contains, beſides the relief which a bill in equity for a ſpecific performance may afford him, the party injured has one of two remedies at common law; namely, an action of debt, or covenant if the agreement be by deed, or an action of debt, or ſpecial *aſſumpſit*, if it be either by writing without deed, or by parol, provided the contract be to be performed within a year from the making thereof. *Remedies at Law.* 29 C. 2. c. 3.

An action of covenant lies when a man covenants with another by deed to do ſomething and does it not; and it lies upon a covenant in any deed, whether indented or poll. Com. Dig. tit. Covenant, (A. 1.)

But covenant does not lie upon an agreement without deed; but an action upon the caſe: except in London, where covenant lies without deed, by cuſtom. *Ibid.*

A covenant is the agreement or conſent of two or more by deed in writing, ſealed and delivered, whereby either or one of the parties doth promiſe to the other, that ſomething Shep. Touch. 160.

is

is done already, or ſhall be done afterwards. He that makes the covenant is called the covenantor, and he to whom it is made, the covenantee.

Bac. Abr. tit. Covenant, (A. 3.) The law does not ſeem to have appropriated any ſet form of words which are abſolutely neceſſary to be made uſe of in creating a covenant; and therefore it ſeems any words will be effectual for that purpoſe, which ſhew the parties concurrence to the performance of a future act.

Bull. N. P. 161. All covenants are to be taken according to the intent of the parties; but if there be any doubt on the ſenſe of the words, ſuch conſtruction ſhall be made as is moſt ſtrong againſt the covenantor.

Ibid. In covenant all is recoverable in damages, and thoſe will be what the party can prove that he has actually ſuſtained; therefore in covenant it is ſufficient to aſſign the breach in the words of the covenant.

Com. Dig. tit. Covenant (B. 1.) If a man covenants with *B.* to do a perſonal thing, and *B.* dies, his executor or adminiſtrator ſhall have covenant upon it. So if he covenants with *B.* and does not name his executor or adminiſtrator.

If the agreement be by writing without deed or by parol, damages for a breach of it may be recovered in an action on the caſe upon a ſpecial *aſſumpſit.*

29 C. c. 2. c. 3. By the ſtatute of Frauds, no action ſhall be brought to charge, *&c.* upon any contract, or ſale of lands or tenements, or any intereſt in or concerning them, or upon any agreement that is not to be performed within the ſpace of one year from the making thereof, unleſs the agreement, or ſome *memorandum* or note thereof, be in writing, and ſigned by the party to be charged therewith, or by ſome other perſon by him thereunto lawfully authorized.

2 Rol. 12. l. 15. An action may be brought in conſideration that the plaintiff will make a leaſe according to a former agreement; for the agreement is not executed till the leaſe is made.

1 Vent. 361. So, if an agreement be to aſſign a term of years, as well as where it is for an intereſt created *de novo.*

6 T. R. 319. An agreement, though not under ſeal, may be declared on ſpecially, in which caſe it may be ſaid to bind the parties by its own force: or the plaintiff may, in ſome inſtances,

ſtances, declare generally, and give the written contract in evidence.

Where money has been paid under an agreement, which has not been performed, it may be recovered in an action for money had and received: and though the agreement be in writing, the party need not declare ſpecially. 2 Eſp. R. 639.

A caſe was ſent to a jury by way of inquiry of damages by the court of *Chancery*, where it appeared that the parties who applied to the court for a ſpecific performance of an agreement, had, by their committee and ſurveyor, viewed without complaint, the progreſs of the party in repairing premiſſes which they at laſt inſiſted on being rebuilt. 3 Atk. 517.

No ſpecific performance will be decreed of an agreement to renew a leaſe in conſideration of money previouſly laid out by the tenant; ſuch promiſe is *nudum pactum:* nor will the caſe be varied by money having been expended by him after ſuch promiſe.—But if, previous to ſuch promiſe, the tenant had ſignified his intention to lay out money, and on that conſideration the promiſe had been made, a ſpecific performance would be decreed. 2 Bro. Ch. c. 140. 1 Eq. Ca. Abr. 18.

SECTION II. *Of the Stamps required to Leaſes and Agreements.*

A LEASE muſt be ſtamped *as a leaſe* by deed, though it be not by deed; for though not by deed, it falls within the words of the act that requires a ſtamp to leaſes, enumerated among other ſpecialties. The ſtatute 23 *G.* 3. *c.* 58. which impoſes a ſtamp duty on "indentures, leaſes, and other "deeds," applies to every inſtrument that operates as a leaſe, whether it be by deed or not: for the impoſition of a duty is a mere matter of poſitive inſtitution; and as a leaſe, by whatever means conſtituted, falls within the words, there is nothing in the nature of the thing to take it out of them. 1 T. R. 737. 3 Bur. 1563.

A deed is good, though executed before it be ſtamped, provided that when it is offered in evidence it be ſtamped, and with the proper ſtamp appropriated to the particular inſtrument.—The author remembers, however, Lord *Eldon*, when Chief Juſtice of the *Common Pleas*, to have ſpoken of an objection having been taken to an agreement being received 1 Str. 624. 2 Str. 716.

received in evidence, not being ſtamped, whereupon it was ſtamped during the trial, and then offered in evidence; but it was again objected to, as not being ſtamped at the time the cauſe of action aroſe.

Whether or not the inſtrument be valid, by the revenue being ſatisfied in point of amount of duty, though the particular ſtamp or ſtamps be not uſed, ſeems to be yet unſettled.

Allen v. Thomas, Aſſ. Maidſtone, 1791. Cor. Gould, J. 2 Eſp. N.P. 777.

For, where in *aſſumpſit* for uſe and occupation, the defendant offered in evidence a demiſe by deed of the premiſes in queſtion, which would have non ſuited the plaintiff under the ſtatute 11 *G.* 2. *c.* 19. on being produced it was not ſtamped with the ſtamp required for leaſes, but was on an agreement ſtamp. For this it was objected to; but it was anſwered, that the ſtamp for leaſes was a ſix-ſhilling ſtamp, and that for agreements of the ſame amount; and that therefore the amount of the ſtamp duties being ſatisfied, that was ſufficient; the Judge was of that opinion, and admitted it to be given in evidence.

Subſequent and very recent determinations, however, of the Court of *King's Bench*, ſupport a doctrine directly contrary to that in the caſe above-mentioned.

6 T. R. 319.

For it has been holden, that articles of agreement under ſeal cannot be given in evidence unleſs ſtamped with a deed ſtamp, although the agreement ſtamp is of the ſame value, but differently formed: Lord *Kenyon* obſerving that it was abſolutely neceſſary that the diſtinction of the ſeveral ſtamps ſhould be preſerved in courts of juſtice, as long as that diſtinction is kept up by the legiſlature; and that it had often proved the means of detecting forgeries, by comparing the ſtamps on forged inſtruments with thoſe in uſe at the time.

1. Eaſt's R. 57.

On the ſame principle it was held that, a promiſſory note written upon a ſtamp of greater value than the proper ſtamp required, could not be given in evidence, though the ſtamp were applicable to the ſame kind of inſtrument. In this caſe alſo Lord *Kenyon* ſaid, However much it were to be wiſhed that an *ad valorem* ſtamp would ſuffice in ſuch caſes, yet till the legiſlature ſo declare it, no other than the particular

particular ſtamp appropriated by the law to the particular inſtrument, can be deemed ſufficient; for the words of the ſtamp acts were expreſs, and could admit of no other interpretation.

An agreement for a leaſe of premiſſes, though under the annual rent of 5 *l.* requires a ſtamp, if the intereſt be a beneficial one. 2 Eſp. R. 595.

The aſſignment of a leaſe by indorſement, agreeable to the ſtatute of Frauds muſt, it is conceived, be ſtamped, under ſtatute 29 *G.* 3. *c.* 58.

Though a parol leaſe for three years is good, yet if a man through caution will reduce it into writing, he muſt pay for the ſtamp, otherwiſe the court are inhibited from receiving it in evidence. Bull. N. P. 269.

But where a party enters and continues in poſſeſſion of premiſſes for any long ſpace of time, as for eighteen years, under articles of agreement for a leaſe, which were not ſtamped, and no leaſe ever tendered or demanded, the agreement was held to be a good defence againſt an ejectment, for though it is in law a leaſe, and therefore ought to be ſtamped, it would be ſet up in equity as an agreement: *tamen quære* the law of this adjudication? Cowp. 424. *Vide ante*, p. 22.

If the party fail on an agreement void for want of the proper ſtamp, he may ſucceed notwithſtanding in a general count on a *quantum meruit*. Bull. N. P. 140.

CHAPTER

CHAPTER III.

Of the Parties to a Leaſe, wherein by whom a Leaſe may be made.

SECTION I. *Of Leaſes by Tenants in Fee-ſimple.*

Fee-ſimple, what.

Co. Lit. c. 1. s. 1.

FEE legally ſignifies inheritance, and *ſimple* is added for that it is deſcendible to a man's heirs generally, that is ſimply, without reſtraint to the heirs of his body and the like. This word "ſimple" therefore excludeth both conditions and limitations that defeat or abridge the fee; whereby it appears, that fee in our legal underſtanding ſignifies that the land belongs to us and our heirs, in reſpect whereof the owner is ſaid to be ſeiſed in fee.

Ibid, s. 11. Com. Dig. tit. "Eſtate," (G. 2.)

As a man cannot have a more ample or a greater eſtate than fee-ſimple, tenants in fee-ſimple may make leaſes without limitation or reſtraint.

Cro. Car. 399.

Tenant in fee grants a leaſe of the reverſion of the ſaid premiſſes after the determination of a leaſe of them by his anceſtor, whoſe leaſe became void by his death; this ſecond leaſe therefore is alſo void, for the leſſor being in poſſeſſion, had no reverſion to grant.

SECTION II. *Of Leaſes by Tenants in Tail.*

Eſtate-tail, what.

13 E. 1. c. 1.

TENANT in fee-tail is by force of the ſtatute of *Weſtminſter* the ſecond, commonly called the ſtatute *de donis*, which changed the fee-ſimple conditional at common law into this eſtate-tail.

2 Bl. Com. p. 113.

Eſtates-tail, are either *general*, or *ſpecial*. Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*; which is called tail-general, becauſe how often ſoever ſuch donee in tail be married, his iſſue in general by all and every ſuch marriage is, in ſucceſſive order, capable of inheriting the eſtate-tail,

performam

performam doni. Tail-ſpecial, is where the gift is reſtrained to certain heirs of the donee's body, and does not go to all of them in general; as where lands and tenements are given to a man, and the *heirs of his body on Mary his now wife to be begotten*; here no iſſue can inherit, but ſuch ſpecial iſſue as is engendered between thoſe two; not ſuch as the huſband may have by another wife.——And here we may obſerve, that the words of inheritance (to him and his *heirs*) give him an eſtate in fee; but they being heirs *to be by him begotten*, this makes it a fee-tail, and the perſon being alſo limited, on whom ſuch heirs ſhall be begotten, (viz. *Mary his preſent wife*,) this makes it a fee-tail-ſpecial. And note, the word *heirs* is applied only to one perſon; in the caſe of females, indeed, they take together, and are called coheireſſes.

Eſtates, in general or ſpecial-tail may, alſo, be either in tail *male*, or tail *female*; as if lands be given to a man, and his *heirs male of his body begotten*, this is an eſtate in tail-male-general; but if to a man and the *heirs female of his body on his preſent wife begotten*, this is an eſtate in tail-female-ſpecial. In caſe of an entail male, the heirs female ſhall never inherit, nor any derived from them; nor *é converſo*, the heirs male, in caſe of a gift in tail-female: thus, if the donee in tail-male hath a daughter, who dies leaving a ſon, ſuch grandſon in this caſe cannot inherit the eſtate-tail, for he cannot deduce his deſcent wholly by heirs male; and as the heir male muſt convey his deſcent wholly by males, ſo muſt the heir female wholly by females. If, therefore, a man hath two eſtates-tail, the one in tail-male, the other in tail-female, and he hath iſſue a daughter, which daughter hath iſſue a ſon, this grandſon cannot ſucceed to either of the eſtates; for he cannot convey his deſcent wholly either in the male or female line. *Ibid.* p. 114.

Power to leaſe by the common law. Bac. Abr. tit Leaſes (D.)

If tenant in tail after the ſtatute *de donis* had made a leaſe for years and died, the leaſe was not abſolutely determined by his death, but the iſſue-in-tail was at liberty either to affirm or avoid it, as he thought fit; and the reaſon why ſuch leaſes for years were not held to be abſolutely determined by the death of the tenant in-tail, who made them, was, either becauſe they were drawn out of an eſtate of in-

heritance, which by poſſibility might continue for ever, and therefore was capable of ſuch a leaſe for years thereof; or becauſe being executed by the entry of the leſſee, there ought to be an act of equal notoriety to defeat or undo it; which if the iſſue in-tail thought fit to waive, the leſſee then continued his poſſeſſion in virtue of the firſt contract and entry. Another reaſon why the law would not condemn ſuch leaſes as abſolutely void by the death of the tenant in-tail, might be the diſcouragement that would thereby ariſe to farmers and huſbandmen who would not be eaſily induced to take leaſes, or beſtow any great pains or labour upon poſſeſſions which they were to hold by ſo precarious a title as the life of the tenant in-tail only. Acceptance by tenant in-tail, of the rent, or fealty, or bringing an action for the recovery thereof, or an action of waſte, were ſuch acts as amounted to a confirmation of the leaſe, becauſe theſe plainly manifeſted his intent to continue the leſſee in poſſeſſion upon the terms of his leaſe; and by conſequence ſuch iſſue could never afterwards avoid it during his own life.

3 Salk. 334. 6 Mod. 1. If *A.* being tenant in-tail with reverſion in fee, make a leaſe for years, and on his death, before the term expires, the iſſue-in-tail levies a fine, this leaſe cannot be avoided be him, or by the cognizee of the fine; for although as the leaſe was derived out of the eſtate-tail, and alſo out of the reverſion, the iſſue in tail might have avoided it; yet having deſtroyed the in-tail by the fine, *his* power is gone, and the cognizee cannot avoid it, becauſe he is a ſtranger who never had any privity in the eſtate-tail.

Bac. Abr. tit. "Leaſes," (D.) If a tenant in-tail makes a leaſe to *A.* for twenty years, and the leſſee makes a leaſe to *B.* for ten years, and then the tenant-in-tail dies, and the iſſue accepts the rent of *B.* this is no affirmation of the leaſe, becauſe *B.* was under no obligation to pay his rent to him, and is anſwerable for it over again to *A.*; and therefore his payment to the iſſue in tail was voluntary and in his own wrong, and the iſſue's acceptance thereof not concluſive, more than if he had received it of a mere ſtranger: and by conſequence, the iſſue in tail may enter and avoid the leaſe: but if the iſſue had accepted the rent from *A.* this had amounted to a confirmation of the leaſe made

made to *A.* and by conſequence he could not after avoid the leaſe to *B.* which was derived thereout.

But if *A.* had aſſigned five acres of the land in leaſe to *B.* for the reſidue of twenty years, and the iſſue in tail had accepted the rent from *B.* this would amount to a confirmation of the entire leaſe to *A.* becauſe the rent iſſuing out of the whole and out of every part of the land, *B.* as to theſe five acres, ſucceeded in the place of *A.* by having his whole intereſt therein; and then the iſſue in-tail by acceptance of the rent from one, whoſe part as to him was equally chargeable with the whole rent, hath given his conſent that the whole eſtate chargeable therewith ſhall continue, though he choſe to take his rent out of part only: for otherwiſe he would do injuſtice to *A.* who would be liable to make recompence to *B.* for the overplus of the rent, and yet have no recompence himſelf, if the iſſue might defeat the reſidue of the leaſe remaining in his hands. *Ibid.*

If a tenant in-tail makes a leaſe for ten years, to begin ten years hence, and dies, and the iſſue within the ten years enters and makes a feoffment in fee, the feoffee at the end of the ten years, ſhall have election either to affirm and make good ſuch leaſe, or to avoid it; for upon the death of tenant in-tail, the poſſeſſion was become vacant, and none had a right to enter but the iſſue in-tail, for the time of the leſſee's entry was not yet come; then when the iſſue enters generally, his primary right was, in reſpect of the inheritance, deſcended to him as iſſue in tail, and he had no occaſion to direct his entry at that time to any other purpoſe; and therefore his entry ſhall be intended in reſpect of the eſtate-tail, deſcended to him: and when after ſuch entry, he makes a feoffment in fee to a ſtranger, this transfers the poſſeſſion juſt in the ſame plight as the iſſue in tail himſelf had it, without any thing done to determine his election, one way or another; and then the ſame power of election paſſes incorporated in the feoffment; and the feoffee, when the time for making uſe thereof is come, may uſe it either to determine the leaſe by ouſting the leſſee, or to affirm or make it good by acceptance of rent from him.

If tenant-in-tail make a leaſe for life, whereby he gains a new reverſion in fee, ſo long as tenant for life lives, and he grants a rent-charge out of the reverſion, and afterwards Co. tit. c. 12. 66

tenant for life dies, whereby the grantor becomes tenant in tail again, and the reverſion in fee is defeated; yet, becauſe the grantor had a right of the entail in him, cloathed with a defeaſible fee-ſimple, the rent-charge remains good againſt him, but not againſt his iſſue: which diverſity, Lord *Coke* obſerves, is worthy of obſervation, for it opens the reaſon of many caſes.

A man ſeized in fee made a leaſe for ninety-nine years, if three perſons ſo long lived; then he ſettled the reverſion upon himſelf in tail, with power to make leaſes for twenty-one years, and then he made ſuch a leaſe and died; the ſon, who was the iſſue in tail, levied a fine and ſold the reverſion: the firſt leaſe, determined, and the Court thought that the cognizee might avoid the ſecond leaſe, becauſe it never was in the election of the tenant in tail, or his iſſue to avoid it, they having conveyed away their eſtates before this ſecond leaſe was to commence; for if tenant in tail make a leaſe to commence *in præſenti*, and convey away his eſtate by fine, the cognizee muſt hold it charged with ſuch leaſe; but if it be to commence *in futuro*, it is otherwiſe, becauſe it cannot be avoided before the commencement. Therefore, if tenant in tail makes a voidable leaſe for years or life, and dies, and the iſſue, before entry on the leſſee, levies a fine to a ſtranger, the cognizee ſhall not avoid the leaſe, becauſe ſuch leaſe being only voidable by entry, when the iſſue before entry conveys over the land by fine, the power of entry, which was the only means of avoiding ſuch leaſe, is by the fine deſtroyed and gone; for a right of entry cannot be transferred to a ſtranger, any more than a right of action: ſo, if the tenant in tail himſelf after ſuch leaſe, had levied a fine to a ſtranger, or even to the reverſioner, and died, yet they could not avoid the leaſe ever after, becauſe, if they could, it muſt be by reaſon of the right of entry transferred by the fine, which would have come to the iſſue if no ſuch fine had been levied; and the law abſolutely condemns all alienations of right only, whether it be right of entry or of action, and conſequently in theſe caſes, by ſuch alienation, the leaſe is become abſolute and unavoidable.

Bac. Abr. tit. "Leaſes," (D.)

If tenant in tail makes a leaſe for thirty or forty years, is rendering

rendering rent, and dies without iſſue, his wife *privement enſient*, with a ſon, and the donor enters, and as to himſelf avoids the leaſe, then the ſon is born and the leſſee re-enters; the ſon at full age may either affirm or avoid ſuch leaſe as he thinks fit; for the leaſe was not abſolutely determined or avoided, more than the eſtate-tail itſelf, out of which it was derived, but only *ſecundum quid*, and ſubject to be ſet up again upon the birth of the iſſue, which revived the eſtate-tail. But if ſuch leaſe were made by the tenant in tail before marriage rendering rent, and then he married and died, leaving his wife *privement enſient*, and the donor enters, and as to himſelf avoids the leaſe, yet if the wife be afterwards endowed, the leaſe is revived as againſt her, becauſe her eſtate is *quodum modo*, a continuance of the eſtate-tail of the huſband, and therefore revives all charges made by him before the marriage: but if the wife be after delivered of a ſon, and dies, now the iſſue may again avoid that leaſe or affirm it, as he thinks fit: or if ſuch leaſe were made after marriage, and the wife being endowed thereof, avoids that leaſe, yet after her death the iſſue in tail may revive it; for in all theſe caſes the avoidance of ſuch leaſes being only by thoſe who had a temporary eſtate or intereſt in the land, it cannot bind thoſe who ſucceeded to the inheritance thereof, but that they may, if they think fit, re-eſtabliſh and ſet up ſuch leaſe again, which, as to them, was at firſt only voidable, and not abſolutely void.

Power to leaſe by the enabling ſtatute.

Thus, by the common-law, tenant in tail could make no leaſes which ſhould bind his iſſue in tail, or the reverſioner; to remedy which, the ſtatute 32 *Henry* 8. *c.* 28. commonly called *The Enabling Statute*, was paſſed. This ſtatute (which regards alſo tenants for life, huſbands ſeized in right of their wives, and eccleſiaſtics, and of which hereafter,) was made purpoſely to give the tenant in tail (amongſt others juſt noticed,) power, by obſerving the directions therein ſpecified, to bind his iſſue, ſo that they ſhall not now after his death, avoid ſuch leaſes, as they might have done before [and may do ſtill, if the ſtatute be not purſued] by the common-law, which was found to be very inconvenient, and a great diſcouragement to farmers and leſſees, who after they had paid great fines, and been at great coſts

and charges in building, and otherwiſe improving the lands and tenements ſo leaſed to them, were after the death of the leſſors, cruelly expulſed and put out (as the ſtatute ſpeaks) by the heirs of the leſſors, by reaſon of private gifts in tail, *&c.* to their great impoveriſhment and undoing.

32 H. 8. c. 28. By the ſtatute therefore, 32 *Henry* 8. called *the Enabling Statute*, any perſon whatſoever, of full age, that hath any eſtate of inheritance in fee-tail in his own right of any lands, tenements, or hereditaments, may at this day, without fine or recovery, make leaſes of ſuch lands for lives or years, and ſuch leaſes ſhall be good; ſo as theſe conditions following be therein obſerved and kept.

1. Such leaſe muſt be by indenture; and not by deed-poll or by parol.

2. It muſt be made to begin from the day of the making thereof or from the making thereof: therefore, a leaſe made to begin from *Michaelmas*, which ſhall be three years after, for twenty-one years; or a leaſe made to begin after the death of the tenant in tail, for twenty-one years, is not good. But a leaſe be made for twenty years, to begin at *Michaelmas* next; it ſeems is a good leaſe; for

3. If there be an old leaſe in being, of the land, the ſame muſt be expired, ſurrendered, or ended within a year of the time of the making of the new leaſe; and this ſurrender muſt be abſolute and not conditional; alſo, it muſt be real, and not illuſory, or in ſhew only. Therefore,

4. There muſt not be a double or concurrent leaſe in being at one time; as if a leaſe for years be made according to the ſtatute, he in reverſion cannot afterwards expulſe the leſſee, and make a leaſe for life or lives, or another leaſe for years according to the ſtatute, nor *e converſo*. But if a leaſe for years be made to one, and afterwards a leaſe for life is made to another, and a letter of attorney is made to give livery of ſeiſin upon the leaſe for life, and before the livery made the firſt leaſe is ſurrendered, in this caſe, the ſecond leaſe is good.

5. Theſe leaſes muſt not exceed three lives, or twenty-one years, from the time of making them; for the words of the ſtatute are to make a leaſe for three lives, *or* twenty-one years, ſo that either the one or the other may be made, but

not

not both. Therefore, if tenant in tail make a leaſe for twenty-two, or for forty years, or for four lives; this leaſe is void, and that not only for the overplus of time more than three lives, or twenty-one years, but for that time of three lives or twenty-one years alſo; and it hath been reſolved, that if tenant in tail make a leaſe for ninety-nine years, determinable upon three lives; that this is not a good leaſe. But if a leaſe be made by a tenant in tail for a leſſer time, as for two lives, or for twenty years; this is a good leaſe. If a leaſe be made for four lives, and it happens, that one of the lives die before the tenant in tail die; yet this accident will not make the leaſe good, but it remains voidable notwithſtanding.

6. Theſe leaſes muſt be of lands, tenements, or hereditaments, manureable or corporeal, which are neceſſary to be let, and whereout a rent by law may be iſſuing and reſerved. Therefore, if a tenant in tail, make a leaſe of ſuch a thing as doth lie in grant, as an advowſon, fair, market, franchiſe, or the like, out of which a rent cannot be reſerved, eſpecially if it be a leaſe for life; this leaſe is void, and that, albeit the thing have been antiently and accuſtomably let. A grant of a rent-charge, therefore, out of ſuch lands is void; and if tenant in tail make a leaſe for three lives of a portion of tithes rendering rent; this leaſe is unqueſtionably void; ſo alſo it ſeems it is, if it be a leaſe for twenty-one years.—But now by the ſtatute 5 *G.* 3. *c.* 17. a leaſe of tithes, or other incorporeal hereditaments alone, may be granted by any biſhop, or any ſuch eccleſiaſtical or eleemoſyonary corporation, and the ſucceſſor ſhall be entitled to recover the rent by an action of debt, which (in caſe of a freehold leaſe) he could not have brought at the common-law.

7. They muſt be of ſuch lands, or tenements, which have been moſt commonly let to farm, or occupied by the farmers thereof, by the ſpace of twenty years next before the leaſe made; ſo as if it had been let for eleven years, at one or ſeveral times within twenty years before the new leaſe made, it is ſufficient. Albeit the letting have been by copy of court-roll only, yet ſuch a letting in fee, for life, or years, is a ſufficient letting, and ſo alſo is a letting at will

by the common law. But theſe lettings to farm muſt be made by ſuch as are ſeized of an eſtate of inheritance; for if it have been only by guardian in chivalry, [now aboliſhed] tenant by the curteſy, in dower, or the like; this will not ſerve to be a letting within the intent of the ſtatute.

8. There muſt be reſerved upon ſuch leaſes yearly, during the ſame leaſes, due and payable to the leſſor and his heirs to whom the reverſion ſhall appertain, ſo much yearly farm or rent, or more, as hath been moſt accuſtomably yielded or paid for the lands, *&c.* within twenty years next before ſuch leaſe made. Therefore, if the rent be reſerved but for part of the time of the new leaſe, this leaſe is void. So, if the tenant in tail have twenty acres of land that have been accuſtomably let, and he make a leaſe of theſe twenty acres, and of one acre more which hath not been accuſtomably let, reſerving the uſual yearly rent, and ſo much more as to exceed the value of the other acre; this is not a good leaſe by the ſtatute. So, if the tenant in tail of two farms, the one at twenty pounds rent, the other at ten pounds rent, and he make a leaſe of both theſe farms together, at thirty pounds rent, this is not a good leaſe within the ſtatute. But if beſides the annual rent, there have been formerly reſerved things not annual, as heriots, fines, or other profit, upon the death of the farmers, or profit out of another's ſoil, as paſturage for a colt, *&c.* if upon the new leaſe the yearly rent be reſerved, albeit theſe collateral reſervations be omitted, yet theſe leaſes are good. So, alſo, if there be more rent reſerved upon the new leaſe than the rent that hath been anciently paid, the leaſe is good notwithſtanding. So, if tenant in tail of land, let a part of it that hath been accuſtomably let, and reſerve the rent *pro rata*, or more, this is good, for that is in ſubſtance the accuſtomable rent. Alſo, if two co-partners be tenants in tail of twenty acres, every one of equal value, and accuſtomably letten, and they make partition ſo as each have ten acres, they may make leaſes of their ſeveral parts of each of them, reſerving the half of the accuſtomable rent. If the accuſtomable rent had been payable at four days or feaſts of the year, yet if it be reſerved yearly payable at one feaſt, it is ſufficient, for the words of the ſtatute to be reſerved

Co. Lit. 44. 6.

reſerved yearly.—On a queſtion, Whether the reſervation of the antient "copyhold," rent or more, in a leaſe made by tenant in tail, would anſwer the deſcription of the antient "accuſtomed" rent, within the ſtatute, it was held that it would. Moore, 759.

9. Such leaſes muſt not be made without impeachment of waſte. Therefore, if a leaſe be made for life, the remainder for life, *&c.* this is not warranted by the ſtatute, becauſe it is diſpuniſhable of waſte. But, if a leaſe be made to one during three lives, this is good; for the occupant, if any happen, ſhall be puniſhed for waſte. Prebend makes a leaſe for years, reſerving the running of a colt, rendering rent, a new leaſe, rendering the ſame rent, without reſerving the running of a colt, adjudged good; becauſe, *quoad* this, it is neither reſervation, nor exception. But if a leaſe be of a manor, except the woods, rendering rent, and after the expiration of it, there is a new leaſe rendering the ſame rent without ſuch exception, the ſecond leaſe is bad. *Ibid. n.* 6.

By this ſtatute, then, a tenant in tail is enabled to grant ſuch leaſes as ſhall bind his iſſue in tail; though not thoſe in remainder or reverſion.

Tenant in tail to him, and the heirs male of his body, had iſſue two ſons by divers venters, and died; the eldeſt ſon entered and made a leaſe for twenty-one years, reſerving rent generally to him and his heirs and aſſigns, and died without iſſue, leaving two ſiſters his heirs at law; and if by this reſervation, the rent belonged to the ſecond brother, to whom the reverſion deſcended, as heir male of the body of the father, was the queſtion; for if not, then the leaſe could not bind him within 32 *H.* 8. *c.* 28.; and it was ſtrongly urged, that the rent could not go to him, becauſe he was neither heir general nor ſpecial to the leſſor; that the reſervation being to the heirs of the leſſor, could not go to the brother of the half-blood: but, notwithſtanding, it was adjudged to be a good leaſe, and that the rent ſhould go along with the reverſion; for the words of the ſtatute are, that the rent ſhall be reſerved to the leſſor and his heirs, or "to thoſe to whom the lands would go if no ſuch leaſe had "been made;" and here the intent was, that the rent ſhould go along with the reverſion; and ſo it may here, for Abr. tit. "Leaſes, (D) 2.

for rent naturally follows the reverſion, and the ſecond brother is heir to the intail and reverſion, though not to the leſſor.

Ibid. Tenant in tail makes a leaſe for twenty years, rendering the uſual rent, *habendum* from *Michaelmas* next enſuing: this ſeems a good leaſe, though it did not begin from the making of the leaſe, according to the proviſo 32 *H.* 8. *c.* 28. for the intent of the ſtatute was only that the leaſe ſhould not exceed the number of twenty-one years from the making, which this leaſe did not, and in the margent, a caſe is of *Thomſon* and *Trafford*, [*Poph.* 8.] 35 *Eliz.* in *B. R.* cited to be adjudged, *per totam curiam*, that it was a good leaſe, and well warranted by the ſtatute; though my Lord *Coke* lays it down for one of his rules, that leaſes upon that ſtatute are not good if they do not commence from the day of the making, which perhaps may be reconciled upon the ſame diverſity, where they are under twenty-one years and where not ſo, that from the time of the ſealing and executing the leaſe, till the expiration thereof, there does not intervene more than twenty-one years. For, if the commencement of the leaſe be at ſuch a diſtance, that between the time of the ſealing and executing thereof, and the expiration, there do not intervene above twenty-one years, then ſuch leaſe ſeems to be without any aid from this ſtatute, though the time for continuance thereof in the poſſeſſion of the leſſee be under twenty-one years; for otherwiſe the tenant in tail might ſo procraſtinate the commencement of the leaſe, as to have always the greateſt part of the twenty-one years running out in the time of his iſſue, which the ſtatute never intended to countenance.

Ibid. So, where one made a leaſe for ten years, and after made another leaſe for eleven years, both theſe leaſes are good, becauſe they do not in all exceed twenty-one years, and ſo the inheritance is not charged with more than a leaſe for twenty-one years, which the ſtatute allows. [Copyholds are not within the ſtatute.]

SECTION III. *Of Leaſes by Tenant in Tail, after poſſibility of Iſſue extinct.*

1 Bl. Com. 124. This eſtate is where one is tenant in ſpecial tail, and the perſon from whoſe body the iſſue was to ſpring, dies without

out iſſue, or having iſſue, that iſſue becomes extinct. The law looks upon this eſtate as equivalent to an eſtate for life only, and in truth the tenant is only tenant for life, and is permitted to exchange his eſtate with a tenant for life; an exchange that can only be made of eſtates that are equal in their nature.

His power to demiſe, therefore, will come more properly within the conſideration of the next ſubject.

Section IV. *Of Leaſes by Tenant for Life; abſolute or contingent.*

Tenant for term of life is where a man lets lands or tenements to another for term of the life of the leſſee, or of another perſon or perſons. Tenant for life has a freehold, as well as tenant in fee or tail. Co. Lit. c. 6. s. 56

Eſtates for life granted abſolutely, will, generally ſpeaking, endure as long as the life for which they are granted. 2 Bl. Com. 122.

But there are ſome eſtates for life which may determine upon future contingencies before the life for which they are granted expires; as where an eſtate be granted to a woman during her widowhood, or a man until he be promoted to a benefice, the duration of the eſtate depends merely upon the condition.

Tenant for life can make no leaſes to continue longer than his own life; for his leaſes are abſolutely void at his death. Bac. Abr. tit. "Leaſes, (L)

Therefore a leaſe ſo rendered void againſt him in remainder, cannot be ſet up in a court of law by ſuch remainder-man's acceptance of rent, and ſuffering the tenant to make improvements after his intereſt veſts in poſſeſſion.—But when the remainder-man lies by, and ſuffers the leſſee or aſſignee to rebuild, and does not by his anſwer deny that he had notice of it, all theſe circumſtances taken together, will bind him in a court of a equity from controverting the leaſe afterwards. Dong. 50. Cowp. 482. Bull. N. P. 96. 7 T. R. 83, 478. 3 Atk. 393.

Alſo, a leaſe executed by a tenant for life, in which the reverſioner, who was then under age is named, but which was not executed by him, is void on the death of the tenant for life, and an execution by the reverſioner afterwards is no confirmation of it, ſo as to bind the leſſee, for it is not his covenant. 1 T. R. 86.

But

Bac. Ab. tit. "Leaſes," (I 2.)

But if tenant for life makes a leaſe for twenty years generally, and afterwards he in reverſion confirms that leaſe, and then the tenant for life dies; though this at firſt would have determined by the death of the leſſor, yet the confirmation hath made it good and unavoidable for the whole term. But if the leaſe had been for twenty years, if the leſſor tenant for life ſhould ſo long live, there, if the reverſioner had confirmed this leaſe, yet it would not prevent its voidance upon the death of the tenant for life.—The diverſity between which caſes is this: that in the firſt caſe, the leaſe being made generally for twenty years, nothing appears to the contrary but that it was a good leaſe for that time abſolutely; for the death of the leſſor, which would determine it ſooner, does not appear in the leaſe itſelf; then when the reverſioner, who alone could take advantage of that implied limitation, thinks fit to waive it, and confirms the leaſe as it was made at firſt for twenty years abſolutely, this makes it *his own leaſe* for ſo much of the time as would have fallen into his reverſion by the death of the tenant for life being made the expreſs limitation and circumſcription of the twenty years in the leaſe itſelf, no confirmation of that leaſe ſo limited can enlarge it to extend beyond the life of the leſſor, that being the expreſs determination affixed to it.

Ibid.

For although we find one caſe, where it is held, that if a man makes a leaſe for twenty-one years, if the leſſee ſo long live, and afterwards the leſſor and leſſee join in a grant by deed of the term to another, after which the firſt leſſee dies within the twenty-one years, yet the grantee ſhall enjoy it during the reſidue of the term abſolutely. To reconcile this caſe with the other, it muſt be intended, that in the aſſignment no notice is taken of the expreſs limitation affixed to the leaſe, but that they joined in an aſſignment of the leaſe for the reſidue of the twenty-one years, and then it may be well conſtrued to amount to *a confirmation by the leſſor* for that time, as the leſſor may confirm the land to the leſſee for any longer time, and thereby enlarge his eſtate or intereſt.

Ibid.

B. tenant for the life of *C.* and he in remainder or reverſion in fee join in a leaſe for years by indenture; this,

during

during the life of *C.* is the leaſe of *B.* who then only had the preſent intereſt in the lands, and the confirmation of him in the remainder or reverſion; but after the death of *C.* then this becomes the leaſe of him in the reverſion or remainder, and the confirmation of *B.*; for the leſſors having ſeveral eſtates in them in ſeveral degrees, the leaſe ſhall be conſtrued to move out of each one's reſpective eſtate or intereſt, as they become capable of ſupporting it, which is the moſt natural and uſeful conſtruction of the leaſe, eſpecially as there can be no eſtoppel in this caſe, by reaſon of the ſeveral intereſts which paſſed from each. Therefore during the life of tenant for life, if the leſſee being evicted, ſhould declare of a leaſe for both, this would be againſt him, as was adjudged, becauſe for that time it was only the leaſe of the tenant for life.

A. leſſee for life makes a leaſe to *B.* and *C.* on condition that if they die leaving *A.* then the land ſhall revert to *A.* without determining any eſtate certain in the grant; all the eſtate paſſes under the condition, for *in præcipe A.* was not received on default of *B.* and *C.* Co. Lit. c. 6. s. 56. n. 11.

If tenant for life and he in remainder in-tail join in a leaſe to *A.* for life, remainder to *B.* for life, and the iſſue-in-tail accepts the rent of *A.* and levies a fine, the leaſe in remainder is good, notwithſtanding the feoffment. Cro. Eliz. 252.

Where leſſee for life makes a leaſe for years, excepting the wood, underwood, and trees growing upon the land, it is a good exception, although he has no intereſt in them but as leſſee, becauſe he remains always tenant, and is chargeable in waſte; wherefore to prevent it, he may make the exception.—But if leſſee for years aſſign over his term, with ſuch an exception, it is a void exception. Cro. Jac. 296.

Section V. *Of Leaſes by Tenants per auter Vie.*

Where a perſon holds for the term of another's life, he is called tenant *per anter vie*; and leaſes made by him of courſe determine on the death of the *ceſtui que vie*, or perſon during whoſe life he holds, but not on his own death; for by the ſtatute of Frauds every eſtate *per auter vie* is made deviſeable, and if not deviſed, it ſhall be aſſets in the hands of the heir, if limited to the heir; if not limited to the heir,

heir, it ſhall go to the executor or adminiſtrator of the grantee, and be aſſets in their hands.

SECTION VI. *Of Leaſes by Tenant by the Curteſy of England; in Dower; or Jointure.*

2 Bl. Com. 214. Tenant by the curteſy is where a man marries a woman ſeiſed of an eſtate of inheritance, and has by her iſſue born alive, which was capable of inheriting her eſtate.—Tenancy in dower, (to which the before-mentioned eſtate is well termed a law of counter-tenure) is where the huſband of a woman is ſeiſed of an eſtate of inheritance, and dies, with or without iſſue, in which caſe, the wife ſhall have the third part of all the lands and tenements whereof he was ſeiſed at any time during the coverture, to hold to herſelf during the term of her natural life. Tenant in jointure is by the *ibid.* 36. 27 *H.* 8. *c.* 10. commonly called the Statute of Uſes, by which dower may be barred by a jointure, or by conveying a joint-eſtate to huſband and wife; but in common acceptation, it means a ſole eſtate limited to the wife only.

Bac. on Eng. Gov. b. 1 c. lxi. 2 Bl. Com. 129

Bac. Abr. tit. "Leaſes," (I) 1. Cro. Car. 398. As to theſe reſpective eſtates, it will be ſufficient to obſerve, that if either of the tenants make a leaſe for years, reſerving rent, and die, this leaſe is abſolutely determined, ſo that no acceptance of rent by the heir or thoſe in reverſion can make it good; for though their eſtate is *quodum modo*, a continuance of the eſtate of their huſband or wife, yet it is a continuance of it only for life, and they have no power to contract for, or intermeddle with the inheritance, and conſequently their leaſes or charges fall off with the eſtate whereout they were derived, and the leſſee is become tenant by ſufferance by his continuance of poſſeſſion after.

SECTION VII. *Of Leaſes under Powers.*

St. 27. H. 8. c. 10. The ſtatute 27 *H.* 8. *c.* 10. commonly called *the Statute of Uſes*, enacts, that where any perſon or perſons ſtand or be ſeiſed of or in any honours, caſtles, manors, lands, tenements, rents, ſervices, reverſions, remainders, or other hereditaments, to the uſe, confidence, or truſt, of any other perſon or perſons, or of any body politick, by reaſon of any bargain and ſale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwiſe by any manner or mean

means whatſoever it may be, all and every ſuch perſon and perſons, and bodies politick, that have or ſhall have any ſuch uſe, confidence, or truſt, in remainder or reverter, ſhall ſtand and be ſeiſed, deemed and adjudged in lawful ſeiſin, eſtate and poſſeſſion of and in the ſame with all their appurtenances, to all intents, conſtruction, and purpoſes in the law; and that the eſtate, title, right, and poſſeſſion, ſhall be clearly deemed and adjudged to be in him or them that have or ſhall have ſuch uſe, confidence, or truſt, after ſuch quality, manner, form, and condition, as they had before in or to the uſe, confidence, or truſt, that was in them.

The ſtatute then executes the uſe, that is, conveys the poſſeſſion to the uſe, and transfers the uſe to the poſſeſſion, thereby making *ceſtui que uſe*, or him to whoſe uſe the grant was made, complete owner of the lands, as well at law as in equity; but as the intervening eſtate of the feoffee alone is annihilated, but not the conveyance to uſes aboliſhed, the courts conſider them now as merely a mode of conveyance.

When the mode of conveying eſtates in that form which is called ſtrict ſettlement became general, the neceſſity of ſome ſuch modification of an uſe, as that of a power to leaſe, muſt ſoon have been evident to thoſe whoſe habits led them to the contemplation of this branch of our law: for the inconveniences that muſt have occurred to a tenant for life for want of it muſt have been obvious to every one. Tenant for life without ſuch power had no means of inſuring to his leſſee any certain intereſt in his lands, ſince he could create no eſtate therein to laſt beyond the term of his own life. A tenure ſo uncertain afforded very little encouragement to induce the farmer to improve, as whatever ſum he might expend, the death of his leſſor would put an end to his intereſt, and veſt the eſtate in the remainder-man, who might then reap the fruits of his labour and fortune, either by making him pay a rent in proportion to the additional value ariſing from the improvements of the leſſee, or, on his refuſal to comply with thoſe terms, by evicting him and taking a new tenant. Keeping tenants, therefore, in a ſituation ſo fluctuating, was equally prejudicial to the intereſt of the tenant for life, and the remainder-man: for the tenant

Powel on Powers, 385.

tenant for life ſuffered becauſe no leſſee would pay an adequate rent for a leaſe on which he was afraid to embark his capital, from the apprehenſion that he might be evicted on the ſudden death of his leſſor, before he had reaped the advantage of it, and the remainder-man ſuffered from the eſtate coming to him in a neglected and unimproved condition.

Ibid. 387. To encourage thoſe, therefore, who were ſkilled in the arts of huſbandry, to apply their attention and fortunes in the cultivation and improvement of lands, it became neceſſary to ſecure to them a fixed and certain period in the occupation and manurance of them; in order to do which, it was neceſſary that the tenant for life, under ſuch ſettlement, ſhould be empowered to ſecure to his tenants a certain time in their eſtates in all events; with a view to effect which, leaſing powers ſeem to have been invented. But as the introduction of general leaſing powers would have been of as great prejudice to the remainder-man on the one hand, by putting him in the power of the tenant for life, as the want of ſuch a power was on the other hand to the tenant for life and the remainder-man, by diſcouraging the tenants from improving the eſtate; it therefore became cuſtomary in the creation of ſuch powers, to reſtrain the tenant for life to convey only a certain intereſt upon preciſe terms, and in a certain manner preſcribed by ſuch power; ſo that as, on the one hand, the power to leaſe was invented principally for the benefit of the tenant for life, ſo on the other hand, the reſtrictions and limitations of that power were added for the benefit of the remainder-man.

1 Bur. 120. The limitation and modifying of eſtates by virtue of powers, came from equity into the common law with the ſtatute of uſes: as therefore powers came into the courts of

Doug. 293. law with the ſtatute of uſes, ſo the conſtruction of them, by the expreſs direction of the ſtatute, muſt be the ſame as

2 Bur. 1146. 1 Bl. R. 283. in courts of equity; for whatever is a good power or execution in equity, the ſtatute makes good at law. As powers are derived from equity, and ought even at law to be conſtrued equitably, ſo in the conſtruction of powers originally

Cowp. 267. in their nature legal, courts of equity muſt follow the law, be the conſideration ever ſo meritorious: for inſtance, powers by a tenant in tail to make leaſes under the ſtatute

ſtatute 32 *H.* 8. *c.* 28. if not executed in the requiſite form, no conſideration ever ſo meritorious will avail.

The circumſtances attending the execution of ſuch leaſes may be conſidered, 1. With reſpect to the leſſor; 2. to the leſſee; 3. to the ſubject on which the power is to operate; 4. to the quality and quantity of intereſt to be granted; 5. to the rent; 6. to the form of the leaſe. Powell on Pow. 390.

1. With reſpect to the leſſor.

He muſt, as we have obſerved, purſue the power ſtrictly. The intent of parties who gave the power, ought to govern every conſtruction. He to whom it is given, has a right to enjoy the full exerciſe of it: they, over whoſe eſtates it is given, have a right to ſay, "It ſhall not be exceeded, the "condition ſhall not be evaded; it ſhall be *ſtrictly purſued* "in form and ſubſtance: and all acts done under a ſpecial "authority, not agreeable thereto, nor warranted thereby, "muſt be void." 1 Bur. 120.

If tenant for life, therefore, has a ſpecial power of granting leaſes for a longer term than his own life, upon his death the leaſe is void, unleſs he has ſtrictly purſued the power: and in reſpect to the execution of powers, courts of juſtice have always looked with a jealous eye to ſee that the conditions in favour of the next taker be purſued, not literally only, but ſubſtantially. 1 T. R. 709. 5 T. R. 507. 1 Bur. 121.

So, tenant for life, with power to make leaſes for three lives, or twenty-one years, cannot make ſuch leaſes by letter of attorney, by virtue of his power; becauſe, ſuch leaſes not being derived out of the intereſt of the tenant for life, but by an authority derived from the tenant in fee, and to charge the eſtate of third perſons, the truſt for that purpoſe is perſonal, and cannot be delegated to another. 2 Co. 76. *a.*

A power to make leaſes generally, extends only to leaſes in poſſeſſion, and not to leaſes in reverſion, or *in futuro*. Cro. Jac. 318. 1 Com. R. 39. *ſ. p.*

The grant of a leaſe need not be in actual poſſeſſion, but a conſtructive poſſeſſion, by the receipt of the rents and profits, is a ſufficient compliance with the power. If actual poſſeſſion were neceſſary, a leaſing power could never be executed where the land is in the hands of a tenant. Doug. 293.

Therefore, where a tenant for life, with power to grant leaſes in poſſeſſion for twenty-one years at the beſt rent, *Ibid.*

conveyed his life eſtate to truſtees, to pay an annuity for his life, and the ſurplus to himſelf, the power was held to be not thereby extinguiſhed, but he might ſtill grant a leaſe agreeable to the terms thereof.

2. With reſpect to the leſſee.

T. Ray. 163. The leſſee, in a leaſe under a power, muſt, it ſhould ſeem, be a perſon in being at the time when it is made; for generally ſuch leaſes cannot be made in reverſion or *in futuro:* and it has been held, that if a power be to make leaſes to one, two, or three perſons, the donee of the power cannot make a leaſe for the life of the firſt ſon of *J. S.* becauſe the perſon to take under the power ought to be *in eſſe.*

Cro. Jac. 180. If a man covenant in conſideration of natural affection, with a power to make leaſes, a leaſe to a ſtranger is void.

3. With reſpect to the ſubject on which the power is to operate.

Doug. 573. It is apparent from the ſtatutes of 32 *H.* 8. *c.* 28. and 13 *Eliz. c.* 10. that the legiſlature meant to confine the authority to let, to lands which had been formerly letten, and were capable of producing profit.

2 Roll. Abr. 261: If therefore, a leaſing power be reſtrained to be exerciſed only over hereditaments *uſually letten*, lands twice letten are included within that deſcription.

Ibid. 13. But lands that have been but once letten, are not within ſuch a power.

So, if lands had been leaſed by virtue of a contract, from year to year, for three years, this cannot be ſaid to be uſually letten, becauſe this is but one leaſe, though renewable every year.

Powell on Pow. 392, 3. Cro. Jac. 79. Any kind of demiſe is ſufficient to ſupport ſuch power, there being no neceſſity that it ſhould have been demiſed by indenture; a demiſe at will, or by copy, is ſufficient to make land to be accounted uſually demiſeable.

Powell on Pow. 395. But lands not demiſed for the ſpace of twenty years before the execution of a power to demiſe, at the rent then uſually reſerved and paid, cannot be leaſed under ſuch power.

Vaugh. 31. Sir T. Jones, 27. L. C. Thus, where there was a tenant for life, with power to make leaſes of all or any of the lands in an indenture of ſettlement, particularly mentioned, which at any time theretofore

theretofore had been uſually letten or demiſed, for, and during the term of twenty-one years or under, in poſſeſſion, and not in reverſion, reſerving the rent thereupon, then yielded or paid, or more: tenant for life made a leaſe of part of the premiſſes mentioned in the ſettlement, which had been let at 100 *l.* *per ann.* for twenty-one years; but which term of twenty-one years had expired, and the premiſſes had not been let for the ſpace of twenty years before the demiſe, under the power which was the ſubject of diſpute.

The queſtion was, whether or not theſe lands came within the deſcription of lands at any time heretofore uſually demiſed? And by *Vaughan*, C. J.—The word, *uſually* demiſed, might be taken in two ſenſes: the one for the often farming, or repeated acts of leaſing lands, to which ſenſe this caſe did reaſonably extend; the other ſenſe of uſually demiſed was, for the common continuance of lands in leaſe, for that was [or ſignified] uſually demiſed, and ſo lands leaſed for 500 years, long ſince was lands uſually demiſed [namely] that was [were] in leaſe, though it [they] had not been more than once demiſed, which was the more received ſenſe of the words "uſually "demiſed." The meaning of the words "at any time," was various. If it were aſked by way of queſtion, Were you at any time at *York*? it was the ſame as, Were you ever, or ſome time at *York*? So the queſtion, Was this land at any time in leaſe? was the ſame as, Was it ever or ſome time in leaſe? But when the words "at any time" were not part of a *queſtion*; but of *an anſwer*; they had a different and contrary meaning: as if it were aſked, Where may I ſee or ſpeak with *John Styles*? and it were anſwered, You may ſpeak with him, or ſee him "at any time" at his houſe: there the words "at any time" ſignify "at all "times," and not, as in the queſtion "at ſome time:" ſo, where the words were uſed by way of plain enunciation, and not as part of a queſtion or anſwer; as, You ſhall be welcome to my houſe at any time; they ſignify, You ſhall be welcome at all times. So, in the principal caſe, if it were made a queſtion, Was ſuch land heretofore at any time uſually letten and ſet to farm? it imports in the queſtion,

Powell on Pow. *ut ante.*

Was the land ever, or at ſome time heretofore (how long ago ſoever) uſually let to farm? But by way of enunciation, if it were ſaid, This land was uſually let to farm at any time heretofore, it means, This was commonly at all times heretofore let to farm. So, This land was uſually in paſture at any time heretofore; ſignifies, This land was always, or commonly, in paſture heretofore. So, you may leaſe any land heretofore letten to farm at any time uſually; is the ſame as "Heretofore letten to farm, commonly "at all times:" and this conſtruction of the proviſo agreed with both the words and intention of the ſettlement. But what was not farmed at the time of this proviſo made, nor twenty years before, could not be ſaid to be at any time before commonly farmed; for thoſe twenty years were a time before in which it was not farmed.

Ibid. But to come cloſer, the proviſo was, that leaſes might be made for twenty-one years of any lands in the deed, reſerving the rents thereupon reſerved at the time of the deed made, which neceſſarily implied, that the land demiſeable by that proviſo muſt be land which then was under rent; for if no rent then was, the rent then thereupon reſerved, could not be reſerved. But the premiſſes in queſtion had then no rent upon them, for they were not let of twenty years before, nor then, and therefore were not demiſeable by that proviſo. The words "or more," could not at all help the leſſee; for the words "more" or "leſs," were words of relation; the one of addition to what was before, the other of diminution: for "more" or "leſs," muſt relate to ſomething poſitive before, and could never be a relation to nothing. So, "more wages" neceſſarily implied ſome before; "more meat, more drink," and, in every expreſſion, "more" denoted a relative to ſomewhat before of the kind; and in the preſent caſe, reſerving "more rent," muſt imply ſome before reſerved: and, therefore, where none was at the time of the deed made, 12 *Jac.* 1. there could not, in any congruity of ſpeech, more be reſerved or intended to be reſerved.

5 Mod. 245, 378. 12 Mod. 148. *ſ. c.* 1 Com. R. 37. *ſ. c.* Under a power to leaſe the whole of a manor, "except "the antient demeſne lands of the ſaid manor," copyhold lands cannot be demiſed, for they are excepted as being antient

"antient demeſne lands, parcel of the manor."—The rents and ſervices, however, may be demiſed within the power. 1 Ld. Raym. 267. *ſ. c.* 2 Salk. 537. *ſ. c.*

A covenant to ſtand ſeiſed, as it is a leaſe if made by the owner, ſo alſo is it an evidence of the uſual manner of demiſing. 3 Bur. 1446.

It ſeems now to be ſettled, that the queſtion, whether, under a power to leaſe lands, and other hereditaments, provided that ſuch rent or more be reſerved upon every leaſe as hath been reſerved, or paid for it, within a given time, previous to the creation of the power—lands not before in leaſe may be demiſed, is a queſtion of conſtruction on the intention of the author of the power, to be collected from the inſtrument creating the power, or the circumſtances of the eſtate. Powell on Pow. 402. 2 Roll. Abr. 262, 15. 3 Keb. 597.

Thus, where a power was to leaſe a manor, except the demeſne lands, though copyholds, being within that deſcription, could not be demiſed under ſuch power, yet the rents and ſervices of the manor might; for it appeared to be the intent of the ſettlement, that part of the manor ſhould be demiſeable, and notwithſtanding a qualification annexed to the power which ſaid that the antient rent ſhould be reſerved, and no reſervation of rent could be upon a leaſe of rents and ſervices, out of which no rent iſſues; yet the rents and ſervices might be demiſed within the power; for it appeared, that part of the manor was intended to be compriſed within the power, but that the demeſne lands were not to be compriſed; then the rents and ſervices muſt be, for the whole of the manor conſiſts in demeſnes, rents, and ſervices; and if a man hath a power reſerved to him of making leaſes of two things, and a qualification is annexed to the power, which cannot extend to one of theſe things, he may make a leaſe of that thing without any regard to the qualification. 5 Mod. 245, 378. 1 Com. R. 37, &c.

Accordingly, where there is a power to make a leaſe of a manor, and every part thereof, ſo that ſuch rent be reſerved upon every leaſe as was paid for two years before, and it happens that ſome part of the land was not leaſed at any rent within two years before; a man may make a leaſe of ſuch land, reſerving what rent he pleaſes, for the intent appears to be, that he might make leaſes of the whole manor. *Ibid.*

Ibid. & 1 Vent. 294, &c. cited.

So, alſo, where a man had power to make leaſes of a rectory, tithes, and other lands, reſerving the antient rent, it was held, that he might make leaſes of tithes, although no rent can iſſue out of tithes; but he might demiſe them without any rent if it pleaſed him, for it appeared, that tithes were within the power.

Doug. 565.

So, under a power to leaſe all manors, meſſuages, lands, *&c.* "ſo as there be reſerved as much rent as is now paid "for the ſame," ſuch parts of the eſtate enumerated in the power as have never been demiſed, may be let.

8 Mod. 249. Fort. 332.

But under a power in a family-ſettlement to make leaſes of all or any part of the premiſſes, reſerving the antient rent, lands always occupied with the family ſeat cannot be demiſed; for in ſuch caſe, the qualification annexed to the power, "that the antient rent muſt be reſerved," manifeſtly excluded the manſion-houſe, and lands about it *never* let: the nature of the thing in ſuch caſe, ſpeaks the intent.

5 T. R. 665.

So, under the ſettlement of an eſtate with a power to the tenant in poſſeſſion, to let all or any part of the premiſſes, ſo as the uſual covenants be reſerved, a leaſe of tithes, which had never been let before, was held void.—In all theſe caſes, the intention of the parties is to govern the court in conſtruing the power.

Powell on Pow. 407. *Vide ante.* 1 Mod. 245, 378, &c.

Every power, in the conſtruction of it, is to be taken with ſuch a reſtriction, that the eſtate itſelf, which is ſubjected to the power, ſhall not be deſtroyed by the exerciſe of it. Therefore, in the caſe of *Winter* and *Loveday*, *Rokeby*, J, held that, had the expreſs words uſed in that caſe, "ſo as it "be not of the demeſne lands" been left out, yet there would have been a reſtraint by implication from making leaſes of cuſtomary land held of the manor; for if the cuſtomary land might be demiſed, the manor would be deſtroyed, which it muſt be preſumed, was not the intent of the parties.

4. With reſpect to the quality and quantity of intereſt to be granted.

Doug. 293, 574. 1 Bur. 120. 3 T. R. 665.

The creation, execution, and deſtruction of powers, depend on the ſubſtantial intention and purpoſe of the parties; for the intent of the parties who gave the power, ought to govern every conſtruction.

Upon

Upon a general power to make leaſes, without ſaying more, the law adjudges, that the leaſes ought to be leaſes in poſſeſſion; for if upon ſuch power, a leaſe might be made upon a leaſe, the party might, by making infinite leaſes, detain thoſe in remainder out of poſſeſſion for ever; which would be contrary to the intent of the parties and againſt reaſon. 1 Brownl. 148. 1 Com. R. 39, &c. *ante.*

So, a general power to make leaſes for one and twenty years, does not enable the party to make ſuch a leaſe in reverſion, by which a widow would be deprived of the benefit of her jointure, to ſecure which the land was ſettled by act of Parliament: for, beſide that jointures are favoured in law, the ſtatute intended not to give him that liberty; and, it being a liberty and power, it muſt be ſtrictly purſued. Cro. Eliz. 5.

If a man has power to make leaſes in poſſeſſion or reverſion, if he makes a leaſe in poſſeſſion once, he ſhall never after make a leaſe in reverſion; for he has an election to do the one or the other, but not both. Ld. Raym. 267.

Deviſee for life, with power to make leaſes for twenty-one years, whereupon the old accuſtomed rent ſhall be reſerved, makes a leaſe for twenty-one years under the old rent, *&c.* and a year before the expiration of that leaſe, he makes a leaſe to another for twenty-one years to begin preſently, this leaſe ſeems to be good within his power as a concurrent leaſe, becauſe it is no charge upon the reverſion, nor is there any more than twenty-one years *in toto* againſt the reverſioner: but this power would not warrant the making of leaſes in reverſion, for then he might charge the inheritance *ad infinitum.* Powell on Pow. 428. Bac. Abr. tit. "Leaſes," 417. Leon. 147, 8. Hard. 442.

But, notwithſtanding, where one having power to make leaſes for twenty-one years in poſſeſſion, made a leaſe to *A.* for twenty-one years in truſt for the payment of debts, but the leaſe was made to commence from a time to come, and ſo not purſuant to the power, yet being made for the payment of debts, it was ſupported in equity. Bac. Abr. *ibid.* 418. Cha. Ca. 10.

Under a power to leaſe in poſſeſſion for one, two, or three lives, or for thirty years, or any other number of years determinable on one, two, or three lives; or in reverſion for one, two, or three lives, or for thirty years, or any other number of years determinable on one, two, or three lives; a Ld. Raym. 267.

man cannot make an abſolute leaſe in poſſeſſion for thirty years: an abſolute leaſe in reverſion for thirty years, he may.

Doug. 565. Where there is a power to grant leaſes in poſſeſſion, but not by way of reverſion or future intereſt, a leaſe *per verba de præſenti*, is not contrary to the power, although the eſtate at the time of granting the leaſe, was held by tenants at will, or from year to year; if, at the time, they received directions from the grantor of the leaſe to pay their rent to the leſſee.

Cowp. 714. 2 Wilſ. 165. So, one under a power in a marriage ſettlement to leaſe for twenty-one years in poſſeſſion, but not in reverſion, grants a leaſe to his only daughter for twenty-one years, "to commence *from* the day of the date;" adjudged a good leaſe.—The word "from" may mean either incluſive or excluſive, according to the context and ſubject matter: and the court will conſtrue it ſo as to effectuate the deeds of parties, and not to deſtroy them. [Mr. *Powell*, with great ingenuity, and as ſome perhaps conceive with ſucceſs, attempts to controvert the legal propriety of the above adjudication.]

Bac. Abr. tit. "Leaſes." 3 Keb. 44. One had power in effect to make leaſes for the lives of *A. B.* and *C.* and he makes a leaſe to them for their three lives, and the life of the longer liver of them: and this was held to be ſufficient within the power; becauſe, for three lives generally, and for three lives, and the longer liver of them, is all one, ſince without ſuch words it would have gone to the ſurvivor.—So, a leaſe to one for three lives, or to three for their lives, is all one.

1 Com. R. 315. Where a man makes a ſettlement of the reverſion of lands, demiſed, for life or years to the uſe of one for life, with power to make leaſes generally, he may make a leaſe during the continuance of a former leaſe, to commence after the former; as otherwiſe his power would be ineffectual.

8 Rep. 69. So, *à fortiori*, if a power expreſsly enable one to make leaſes in reverſion, ſuch a leaſe will of courſe be good by virtue thereof.

Powell on Pow. 420. 3 Lev. 167, &c. Under a power to make leaſes "for ninety-nine years, or "three lives in poſſeſſion, or for two lives in poſſeſſion, "and one in reverſion, or for one life in poſſeſſion, and "two

" two in reverſion," the party, during the continuance of the firſt leaſe, made a leaſe for life to *T.*; and the queſtion was, Whether the latter leaſe, being made whilſt the the lives in the former leaſe were in being, was authorized by the power? By two of the juſtices, out of three, it was held, that had the words " in poſſeſſion," and the words of the power been generally to make leaſes, the caſe had been ſtrong in favour of the leaſe, the ſettlement being of a reverſion; but the power being expreſsly to make leaſes in poſſeſſion, the leaſe in reverſion was not within it; and they noticed the particular wording of the power to make leaſes, namely, " for two lives in poſſeſſion, and one in reverſion;" or one " in poſſeſſion, and two in reverſion;" ſo that it appeared, that the ſcope and intent was, never to have an eſtate above three lives in being at one time.

The nature of a leaſe in reverſion is this. In the moſt ample ſenſe, that is ſaid to be a leaſe in reverſion, which hath its commencement at a future day, and then it is oppoſed to a leaſe in poſſeſſion; for every leaſe that is not a leaſe in poſſeſſion, in this ſenſe is ſaid to be a leaſe in reverſion. Where mention is made of leaſes in reverſion of a power, this ſhall be intended of leaſes to commence after the end of a preſent intereſt in being; which is the ſecond notion of a leaſe in reverſion. But as a leaſe for life cannot be made to commence at a future day, where a power is given to make leaſes for one or two lives in reverſion, and to make leaſes for years, the very ſame expreſſion (leaſe in reverſion) will have a different ſignification in the ſame conveyance: being applied to a leaſe for life, it ſhall be intended of a concurrent leaſe, or a leaſe of the reverſion, viz. a leaſe of that land which is at the ſame time under a demiſe; and then it is not to commence after the end of the demiſe; but hath a preſent commencement, and is concurrent with the prior demiſe; but being applied to a leaſe for years, it ſhall be intended of a leaſe which ſhall take its effect after the expiration or determination of a leaſe in being. 5 Mod. 245, 378. 1 Com. R. 39, &c.

The law therefore, which is founded in reaſon and common ſenſe, conſiders " poſſeſſory" and " reverſionary," according to the natural and ordinary import of thoſe terms, (with- Powell on Pow. 434.

(without annexing any artificial idea to them,) as including the ſimple ideas of time preſent, and time to come: and conſequently, that every ſubſiſting intereſt, or time not preſent, is an intereſt or time to come.

5 T. R. 563. The circumſtance of a ſecond leaſe for years being granted to the ſame leſſee who holds under a former leaſe, to commence after the expiration of ſuch former leaſe, does not operate to make the latter a continuation of the former leaſe, where the terms are granted by different deeds; although the reſidue of the time to come after the former leaſe, together with the period for which the latter leaſe is granted, do not in length of time exceed the limits fixed by the power: for the latter will, notwithſtanding, be conſidered as a reverſionary leaſe, as much as if it had been granted to a reverſionary leſſee.

1 Lev. 45. 3 T. R. 462. But, if under a power to demiſe for fourteen years, a leaſe were made of lands, &c. *habendum*, for ſeven years, and ſo from ſeven years to ſeven years, the latter, it ſeems, would be but a continuance of the former term, and an addition to it, and not a remainder or future intereſt.

Powell on Pow. 425. Bac. Abr. tit. Leaſes. Cro. Jac. 347. If there be a power to make leaſes in poſſeſſion expreſsly, which attaches upon an eſtate, part of which is in poſſeſſion, and other part thereof in reverſion, at the creation of the power; the donee of the power may immediately make leaſes in poſſeſſion of the eſtate in reverſion, as well as of that in poſſeſſion: for in ſuch caſe, the word "poſſeſſion," in the power, refers to the leaſe, and not to the land.

Powell, 427. 1 Com. R. 39, *ante*. But it ſeems, that if a power enable any one to make leaſes in reverſion, as well as in poſſeſſion, and ſome part of the land ſubject to the power be in poſſeſſion, and other part of it in reverſion, he cannot make a leaſe in poſſeſſion and another leaſe in reverſion of the ſame land; but his power to make leaſes in reverſion, will be confined to ſuch land as was not then in poſſeſſion; and note the diſtinction between theſe two caſes.

Powell on Pow. 541. 7 T. R. 713. If a power be created to enable a tenant for life, to make leaſes for one, two, or three lives, or for any term or number of years, determinable upon one, two, or three lives, in poſſeſſion, &c. of ſuch part and parts, and ſo much only of the manors, &c. of the creator of the power, as are then demiſed

miſed or granted for any ſuch time, *&c.* no lands or hereditaments can be demiſed under ſuch a power, but what are at the time of the exeeution of the power under leaſe for one, two, or three concurrent lives, or for any term of years, determinable upon one, two, or three concurrent lives; for the meaning of ſuch reſtriction is, that the candles ſhall be all burning at the ſame time.

A power to make a leaſe for three lives was held not to be well executed in law, by a leaſe for ninety-nine years, determinable upon three lives. The reaſon ſeems to be, that the eſtates are different, one being a freehold, and the other a chattel. Such was the conſtruction in *Whitlock's* caſe, and ſuch ſeems now to be the ſettled rule of law, notwithſtanding that the Judges, in 3 *Keb.* 746. thought the conſtruction too nice, and contrary to the intent of the parties, and though determinations to the contrary are in the books. 8. Rep. 70. a. 2 Str. 992. S. P. 8 Co. 69, 70. Bac. Abr. tit. "Leaſes."

Powers to leaſe, *habendum* for lives or years, may be either abſolutely for one, two, or three lives; or for an abſolute term of years, as for thirty years; or qualified, as for any number of years, determinable upon one, two, or three lives.

A man, having a power to grant leaſes, may do leſs than ſuch power enables him to do; or, if he do more, it ſhall be good to the extent of his power.

Thus, where the city of London under a power granted by act of parliament to leaſe for one and one-and-twenty years, granted a leaſe for one and twenty, it was held no variance upon *oyer* of the indenture in which ſuch power was recited. Bac. Abr. tit. "Leaſes." 2 Cha. Ca. 23. Semb. cont. per. Raym. C. J.

So, if a man hath power to leaſe for ten years, and he leaſeth for twenty years, the leaſe for twenty years ſhall be good for ten years of the twenty in equity; and ſo it has been ſettled ſeveral times. 7 Mod. 143.

So, where tenant for life had power to let leaſes for twenty-one years in poſſeſſion, and he made a leaſe for twenty-ſix years, without referring to the power; it was held that the firſt leaſe ſhould be preſumed to have been ſurrendered, and the remainder-man ſhould be bound for twenty-one years of the new leaſe. Amb. 740.

If a man purſues all the requiſites within his power, though Com. Dig. tit. "Poiar," 3. (C)

though he does it by more deeds than are neceſſary, it will be good.

1 Bl. R. 183. A power may be executed at different times, if not fully executed at firſt, provided that the party, in the whole execution, does not tranſgreſs the limits of the power.

2 T. R. 721. If a man has a power to make a life-eſtate to his wife, it need not be executed at one time. So, of a power to raiſe portions.

10 Mod. 36. Therefore if a woman, ſeiſed of an eſtate for life, with a power to leaſe for three lives, or twenty-one years, marries, and then ſhe and her huſband join in making the leaſe, and the huſband and wife both die before the leaſe is expired; here, though the huſband, in right of his wife, and ſhe in her own, are poſſeſſed of an eſtate for life, and therefore can as owners make a leaſe, and there appears no intention of the parties, (imagining perhaps that they ſhould have outlived the leaſe,) that this leaſe ſhould be made by virtue of the power; yet becauſe the leaſe, ſuppoſing it made by them as owners, cannot have the effect the parties intended, for ſome it would have (viz. it would be a good leaſe during the lives of the huſband and wife,) yet becauſe it cannot have all, it ſhall be eſteemed to be made by virtue of the power.

1 Vent. 228. If the deed has not a full operation, except where it is in execution of his power, it will notwithſtanding be good; as if tenant for life make a leaſe, without taking notice of his power, it ſhall be an execution of his power to make leaſes; for otherwiſe the leaſe will not have an effectual continuance.

Com. Dig. tit. "Poiar," (C. 5.) A will under a power, not atteſted to paſs a real eſtate, is a good execution of the power as to the perſonalty.

Cro. Car. 376. So, if a wife has power to diſpoſe by writing under hand and ſeal, a diſpoſition by a writing in the nature of a will, ſigned and ſealed, will be good.

3 Bro. Ch. R. 585. So, if a feme-covert having a power to diſpoſe by will ſigned and ſealed by her, make a teſtamentary paper not ſealed, but on a *ſtamp*, this is equivalent to ſealing, and is a good execution of the power.

Cowp. 260. But a power to appoint by "deed" executed in the preſence

preſence of two witneſſes, is ill executed by a will: otherwiſe, if the power be to appoint by any "writing or inſtrument," or other general term.

For the execution of a power may be without deed, where that is not expreſsly required; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwiſe, where it takes an effect out of an intereſt, and is to enure as a grant, for then, if it be of a thing incorporeal, it muſt be by deed. 2 Salk. 467. 5 Mod. 386. 12 Mod. 200. S. C.

5. With reſpect to the rent.

There are two methods of leaſing in common uſe in this kingdom: at the beſt rent, and upon fines, which as the lives or leaſes drop, are conſidered among the annual profits. This power is always adapted to both; and is inſerted in almoſt every ſtrict ſettlement of every kind. 1 Bur. 122.

It is neceſſary to premiſe, that the rules of law adopted in caſes of eccleſiaſtical leaſes, (of which hereafter,) and of leaſes made by virtue of the ſtatute *H.* 8. as to leaſes made by tenant-in-tail, (of which before,) apply equally to leaſes made by virtue of powers in ſettlements; the authorities therefore decided on the former equally apply to the latter. Powell on Powers, 544. Doug. 574.

A power, it has been noticed, ought to be conſtrued ſtrictly; for if all circumſtances are not obſerved, it will be a void execution of it.

Therefore, if a power be to make leaſes, rendering the antient rent, a leaſe which does not reſerve it will be void; as if the party leaſes two acres with other land, and reſerves the rent of the two acres for the whole. Com. Dig. tit. "Poiar," C. 6.

By a reſervation in a power to leaſe, of the antient and accuſtomed rent, is to be underſtood that rent which was reſerved at the creation of the power, if a leaſe were *then* in being; or that which was laſt *before* reſerved, if no leaſe were then in being; for he who created ſuch a power intended no more than that the leſſor and leſſee ſhould not be able to put the eſtate in a worſe condition than it was in when the power was created, but ſhould keep it in the ſame plight and condition at leaſt, as it was in when ſo ſettled.—This was the opinion of Lord *Hale*, who alſo obſerved, that without a certainty, the power could not be executed even 3 Ch Rep. 66. 1 Vern. 531, 542. Bac. Abr. tit. "Leaſes."

by reſerving a ſum in particular; and therefore, he gave it as his opinion, that upon any ſettlement where a power was reſerved to the tenant for life to make leaſes of the lands in that ſettlement, (which were antiently and accuſtomably demiſed, and whereof fines had been taken,) at the antient, uſual, and accuſtomable rent, for three lives, or one and twenty years, or any other number of years determinable on three lives, that rent which was *then* or *laſt before* reſerved upon a leaſe in being of the ſame lands, or on a leaſe which expired laſt before the time of the ſettlement made, muſt be the ſum and no other.

Ibid. But Lord *Cowper*, in the ſame caſe, doubted as to this point, and ſuggeſted, that ſuppoſe lands were leaſed once at a greater and twice at a leſſer rent, he took the rent of the former leaſe to be the antient rent: the laſt leaſe might be made by him that had the fee, who was not bound to reſerve the antient rent, but might let it for nothing if he pleaſed.—So, his lordſhip thought that this rule would likewiſe not apply to lands antiently demiſed, whereof fines had been taken; for there the rents were more or leſs, as the fines were higher or lower.

Powell on Powers, 551. But it ſeems that, if the cuſtom of the country where the lands lie be to leaſe partly on a rent, and to take a fine for the remaining value, then Lord *Holt's* mode of aſcertaining the antient rent is moſt reaſonable.—So, if ſuch power be to leaſe, reſerving ſo much yearly rent, or more, as hath "been moſt accuſtomably" yielded or paid within twenty years next before ſuch leaſe thereof made, the rent reſerved within the twenty years muſt be the meaſure of the reſervation upon leaſes made by virtue of ſuch power, although a greater rent hath been reſerved before the twenty years.

Ibid. But if *ſeveral* rents have been reſerved within the twenty years referred to, Lord *Holt's* rule ſeems in that caſe the moſt proper to go by: unleſs the leaſes on which the rent has been reſerved within the twenty years have been ſometimes with fines and ſometimes without, in which caſe Lord *Cowper's* rule ſeems beſt.

3 Bur. 1446. Tenant for life under a power in a ſettlement to leaſe at the "uſual rent," may demiſe upon reſerving the uſual fines and rent, where the uſual profit had heretofore been made by

by fines; for if the truſtees under the ſettlement were obliged to let the lands at a rack-rent, it might be quite inconſiſtent with the nature of theſe eſtates.

If a leaſe be made under a power to demiſe, reſerving the true and antient rent, and the rent reſerved be not conformable to that both in quantity and quality, and manner of reſervation alſo, the leaſe (it is ſaid) will be void. Powell on Powers, 552.

Thus, where rent, antiently payable in gold, was in a new leaſe under a power ſo reſtricted made payable in ſilver, ſuch leaſe would not bind; for the variation might be prejudicial to the remainder-man.—But a reſervation of "eight "buſhels" where "a quarter of corn" was mentioned in the power, will be good; for the variation is only in words. 5 Reſol in. 5 Rep. 3. 6. Mountjoy's Caſe.

If a tenant in tail be of two farms, under a ſettlement, one of which has been always let at 20 *l.* rent, and the other for 10 *l.* rent, he may not, (it is ſaid) by virtue of ſuch power, make a leaſe of both for twenty-one years, rendering an entire rent of 30 *l.* *Ibid.*

So, two farms, uſually let to ſeparate tenants, cannot be let by one leaſe to one tenant, by 32 *H.* 8. *c.* 28. though a greater rent be reſerved. Cro. Car. 23.

For the intent of ſuch reſervation is, not only that the old ſum of money ſhall be reſerved, but that it ſhall be iſſuing out of the old land. Powell on Powers, 554.

Improving the eſtate will not be conſidered ſuch an alteration as varies the rent, by making it to iſſue out of other hereditaments than thoſe contained in the power; as where the tenant entered and built a new houſe upon the land, and then made a leaſe for twenty-one years, reſerving only the antient rent, *&c.* the court would not ſuffer an objection to it to be argued. 1 Leon. 147.

If a power to leaſe be, provided that two parts in three of the improved value be reſerved as a rent, the reſervation may be made in the terms of the power; and the conſtant payment of ſuch a ſum as amounted to that at the time of making ſuch a leaſe, will be good, whether the tenements that are the ſubjects of it riſe or fall in value. Powell on Powers, 555. 2 Ch. R. 82.

But in general, it ſeems neceſſary, that the ſum intended to be reſerved under ſuch proviſoes in family ſettlements and Powell *ut ante.* 3 Bro. Par. Ca. 248.

Gilb. Eq. R. 45. S. C. 2 Vern. 531, 542.

and conveyances, ſhould be *ſpecifically* ſtated in the leaſe; for otherwiſe the remainder-man may be put to infinite trouble and expence. It hath, therefore, been held, that the reſervation may not be made in the ſame or as general terms as the power itſelf is; as, by ſimply tranſcribing the clauſe reſpecting the reſervation of the antient and accuſtomable rent, *&c.* in the inſtrument creating the power to leaſe, into the leaſe, leaving the neceſſity of averring and proving what was the antient and accuſtomable rent to the tenant for life or remainder-man.

Ibid.

So, where tenant for life had made a leaſe of the lands not uſually letten, reſerving therefore the beſt and moſt approved rents for the ſame, according to the words of the power; this was held to be ſo utterly uncertain, that nothing was offered to ſupport it.

Bac. Abr tit. "Leaſes." 3 Ch. R. 61, 76.

But where ſuch rent is aſcertainable, it is otherwiſe; for *id certum eſt quod certam reddi poteſt.*—Therefore, where a power was, by a ſettlement, to make leaſes of lands antiently demiſed, reſerving at leaſt 12 *d.* for every Cheſhire acre; and a leaſe was made of all the lands antiently demiſed, reſerving all the rent intended to be reſerved: though theſe words were very general and uncertain in themſelves, the reſervation was held good, becauſe it might eaſily be aſcertained by the reference of the 12 *d.* at leaſt for every Cheſhire acre, for it is known what a Cheſhire acre is; and that may by admeaſurement be at all times aſcertained, and depends not upon uncertain evidence.

Powell on Powers, 567. 1 Vent. 338, 339. 1 Vent. 228. *ante*

If the leaſe be of lands ſubjected to a power, together with other lands not ſo ſubjected, and there be equivocal words, under which the reſervation of the rent may be referred to, namely, whether to the premiſſes on which the power attaches, or otherwiſe, and the leaſe cannot take effect unleſs the rent be to iſſue out of thoſe premiſſes; then the better opinion ſeems to be, that the reſervation ſhall be taken as referable only to the premiſſes ſubjected to the power, and that by that means the leaſe may be made good.

Powell on Powers, 569. Dyer, 308. 6. Pl. 75 *Vide poſtea.*

It ſeems that ſeveral leaſes may be made in the ſame deed, under ſuch a power, if the reſervations be ſeveral and certain.—Thus where a leaſe for a term of years was made of the manors of *A. B.* and *C.* by indenture, rendering annually

nually to the leſſor, his heirs, and aſſigns, for *A.* 10 *l.* for *B.* 6 *l.* for *C.* 4 *l.* at the feaſt, *&c.* and payable at one place out of the manor, with a condition to re-enter into the ſaid three manors for non-payment of the ſaid rents, or any of them, or any part or parcel of them, within a month after the ſaid feaſt, *&c.* The leſſor entered upon the leſſee into all the three manors, for rent of one of the manors in arrear; and one point was, whether the ſeveral reſervations of the rent, were ſeveral tenures, demiſes, reverſions, and rents, and to be avowed for ſeverally? Three of the juſtices held that they were: but *Dyer* J. held not; becauſe they were not divers leaſes, but one leaſe to one perſon, and one limitation of an eſtate, and conſequently that there was but one reverſion to which the rent was incident; and that therefore, the ſeveral reſervations of ſeveral rents could not change the nature of the reverſion which was the principal, the rent being only acceſſary. *Ideo quære.*

If there be a difference as to the time of the payment of the rent, ſo that it be not payable at the ſame periods as antiently, that will vitiate a leaſe, under a power reſtricted to be made, rendering the true and antient rent. Thus a reſervation of the rent at two days, where the rent was formerly reſerved and payable at four days, was held, in *Mountjoy's* caſe, to make the grant and render void; becauſe it was *ad nocumentum*, to the injury of the heirs in tail, which was reſtrained by the ſtatute that created the power: for it was more beneficial for them to have it paid at four feaſts than two; and all beneficial qualities of the rent ought to be reſerved and obſerved. Powell on Powers, 571. *Ante.* 32 H. 8. c. 28.

In this reſpect, leaſes under powers in ſettlements differ from eccleſiaſtical leaſes under 13 *Eliz.* (of which hereafter:) for in them a reſervation at two days when the rent was payable formerly at four days, does not vitiate the leaſe, becauſe the ſtatute does not avoid ſuch leaſe if the accuſtomed yearly rent or more be reſerved. *Note the diſtinction.* Cro. Jac. 76.

The whole rent muſt be payable annually during the whole term; for the deſign of the donor is not anſwered, unleſs a continual revenue be yearly payable by compulſion of law, and not in expectancy, or *in futuro.* 1 Bur. 222.

2 Ld. Ray. 2158. But, under a power to make leaſes, reſerving the antient yearly rent annually, yet if it were reſerved upon a day before the year was up, as if the year ended at *Chriſtmas*, and it was reſerved at *Michaelmas*, it would be well, purſuant to the power.

Cro. Jac. 76. 1 Com. R. 312. Heriots and the like need not be reſerved in a leaſe made under a power, reſtrained to be rendering the true and antient rent; for they are caſual and accidental ſervices, and therefore fall not within the meaning of ſuch reſtriction.

Powell on Powers, 573. Although in common law conveyances, no rent can be reſerved but to the leſſor, donor, or feoffor, and his heirs, who are privies in blood, and not to any who is privy in eſtate, as, to him in reverſion, remainder, *&c.* yet in the caſe of powers the reſervation by tenant for life is good, and ſhall enure as rent to the remainder-man, and he may 8 Rep. 70. diſtrain for it; and this, though it be reſerved to ſuch tenant for life, and his heirs; for powers take effect through the medium of the ſtatute of Uſes, which executes the poſſeſſion according to the limitation of the uſe, and ſuch leaſe, when made, takes effect out of the uſes of the ſettlement by which it is created.

Ander. 278. Thus, where a queſtion was, whether the words of the reſervation did not make that which was called a rent, to be only a ſum in groſs, and not rent, and ſo turn the reſervation of rent into a condition? The Court held that the land was diſtrainable for it as for rent, and that it was not a payment upon condition; one reaſon for which was, that it was not the *intent* of thoſe who were parties to the indenture to make it a condition, but rather to make a limitation of the rent for the uſes mentioned; and that it could not enſue the nature of a condition, for it could not be taken as a condition at common law, becauſe thoſe in the remainder were mere ſtrangers to the condition; and a condition united to the uſe of the term it could not be; for, if it were ſo, he in remainder being a ſtranger, could not in law take advantage of it: but if it were rent, he immediately in remainder might diſtrain for the rent, when it incurred due, by reaſon Stat. 27. H. 8. c. 10. of the ſtatute 27 *H.* 8. *c.* 10. of Uſes, by which it was enacted, "that the intent of the parties ſhould be obſerved." Therefore,

fore, if the uſe were ſo limited that a ſtranger ſhould have the rent, &c. he ſhould have it, and might diſtrain for it.

6. With reſpect to the form of the leaſe.

Under a power, requiring the beſt rent that can be reaſonably gotten to be reſerved payable during the term, there muſt be a covenant for payment; for under a mere reſervation, it cannot be payable till entry, and therefore, in fact, may never be payable during the term; beſides, if there be no covenant to pay the rent, the leaſe may be aſſigned to a ſucceſſion of beggars. 1 Bur. 125.

There muſt alſo be a clauſe of re-entry; elſe the ground may be unoccupied without any, or at leaſt a ſufficient diſtreſs upon it, ſo that the remainder-man can neither have his rent nor his land. *Ibid.*

The want of a counter-part too is unuſual, and very prejudicial. *Ibid.*

Where a power to leaſe was reſtrained to be executed, reſerving antient, uſual, and accuſtomed rents, heriots, boons, and ſervices, a covenant "to keep in repair," was held to be "an antient boon," and the omiſſion of it was deemed fatal. *Cited ibid.* 128.

Under a power to a tenant for life to leaſe for years, reſerving the uſual covenants, &c. a leaſe made by him, containing a proviſo, that in caſe the premiſes were blown down or burned, the leſſor ſhould rebuild, otherwiſe the rent ſhould ceaſe, is void; the jury finding that ſuch covenant is unuſual. 1 T. R. 705.

What covenants are uſual or not is a queſtion of fact, it ſeems, for the deciſion of a jury; for *Buller* J. in the preceding caſe, obſerved, that "the Court were relieved from "determining whether the covenant was uſual or not; be"cauſe the jury had expreſsly found that it was unuſual." Powell on Powers, 579.

But if the covenants in a leaſe under ſuch a power be upon the whole, ſuch as leave the parties upon the ſame footing as under former leaſes, (as where it appeared that what was thrown on the landlord was compenſated by what was paid by the tenant,) their differing in trivial circumſtances will not be material. *Ibid.* Doug 565.

It is no objection to a leaſe under a power "that it is in "truſt for him who executes the power," provided the 1 Bur. 124.

legal tenant be bound during the term in all requiſite covenants and conditions.

Livery is not neceſſary to a leaſe for lives, under a power, (though it be incident thereto at common law,) and it hath been held to be a forfeiture of the power; but Lord *Hale* conceived it was not a forfeiture, becauſe a leaſe by virtue of a power, takes effect out of the ſettlement that gives the power, and by ſealing the leaſe the power is executed; and then the livery comes too late to affect it.

2 Vent. 340. 2 Jon. 110. If a power be to *A.* or his aſſigns, to make leaſes, *&c.* the power runs with the eſtate to the aſſignee in deed, or in law.—If, therefore, a power be given to a leſſee for years and his aſſigns, to make leaſes for lives, ſuch power goes to his executor, though only an aſſignee in law, or to the aſſignee of the executor. But a power to an executor to make leaſes does not extend to the executor of his executor.

Skin. 427. If *A.* ſettles land to the uſe of himſelf for life, with power to make leaſes, and afterwards to *D.* upon ſuch truſt as he ſhall afterwards declare; if *A.* declares the truſt for payment of debts, and afterwards leaſes at a ſmall rent, the leaſe is not defeated by the execution of his power; for it is precedent to it.

Hard. 415. So, if a man having a power annexed to his eſtate, charges his eſtate, and afterwards executes his power, the eſtate which ariſes by the execution of the power ſhall be ſubject to the charge during the eſtate: as if tenant for life, with power to make leaſes, grants a rent-charge, and afterwards makes a leaſe, the leſſee ſhall take, ſubject to the rent-charge during the life of the leſſor.

1 Co. 111. *a.* If a man plead an act done purſuant to a power, he ought to ſhew that the power was ſtrictly purſued in all circumſtances.—If he ſays, that it was executed in the preſence of three credible witneſſes, he ought to ſhew who were the witneſſes by name.

1 Mod. 114. If there be a power of revocation, and a leaſe for years is made, ſuch power is ſuſpended *quoad* the term, but after it is good.

A difference ſubſiſts between the non-execution of a power, and a defective execution.

2 P.Wms. 490. A court of equity will not help the former, ſince it is againſt

againſt the nature of a power which is left to the free-will and election of the party, whether to execute or not; for which reaſon equity will not ſay he ſhall execute it, or do that for him which he does not think fit to do for himſelf. *Ibid.* 222. —But where an intention to execute was manifeſted by the party, though it was omitted to be executed, a court of equity will make it good.

A defective execution, however, of a power, will be aided by a court of equity, if for a valuable conſideration; and this againſt a remainder-man, or one not claiming under the power.—In the caſe of defective executions of powers, it is not neceſſary, in order to induce the interference of a court of equity, that the conſideration ſhould be ſtrictly valuable; but it is ſufficient that it be meritorious, that is, founded upon ſome moral obligation.

In the conſtruction of powers, whenever the power is executed for a *meritorious* conſideration, namely, as a proviſion for a wife or child, or for the benefit of creditors or purchaſers, there the preciſe form preſcribed for its execution need not be ſtrictly purſued. Cowp. 267.

Section VIII. *Of Leaſes by Tenant for Years.*

As a leſſee or tenant for years may aſſign or grant over his whole intereſt, ſo he may grant it for any fewer or leſſer number of years than he himſelf holds it; and ſuch derivative leſſee is compellable to pay rent, perform covenants, *&c.* according to the terms agreed in ſuch grant or aſſignment. Alſo it is ſaid [in *Broke* title Diſtreſs 7,] that a termor ſo aſſigning may diſtrain for the rent, without any power reſerved for that purpoſe; though a perſon who aſſigns his whole intereſt cannot, becauſe he has no reverſion. Bac. Abr. tit. Leaſes, (I. 3.)

But ſuch derivative leſſee is not liable (to the original leſſor) for the rent reſerved on the original leaſe, otherwiſe than as his cattle, (*&c.*) may be liable to a diſtreſs for rent-arrear to the original leſſor, as any ſtranger's levant and couchant may be; for there is no privity between him and the original leſſor, as there is between a leſſor and aſſignee: and therefore ſuch an one, though he take the whole term except one day, ſhall not be liable to any of the covenants in the original leaſe. *Ibid.*

Section IX. *Of Leaſes by Tenant from Year to Year; or a leſs Term.*

Any one, poſſeſſed of a certain quantity of intereſt, may alienate the whole, or any part of it, unleſs reſtricted from ſo doing, by agreement with the party from whom he derives that intereſt or eſtate, or by the terms upon which he takes it.

A tenant from year to year, therefore, may aſſign his term, or may underlet part of it, as for three quarters of the year, or ſo many months, *&c.* So, upon the ſame principle, one poſſeſſed of lands or tenements for a leſs term, as for half a year, a quarter, or a month, or the like, may grant his intereſt, however ſmall the quantity, or any portion of it, to another: for, while ſuch intereſt endures, he has the abſolute diſpoſition of it, unleſs ſome agreement ſubſiſts between him and his leſſor, that by circumſcribing his power, qualifies that diſpoſition.

Doug. 283. Cro. Eliz. 156. A tenant at will, however, cannot leaſe, for there can be no ſuch thing as an under tenant to a tenant at will; the demiſe itſelf would amount to a determination of the will. Neither can he ſurrender, any more than he can grant; for, to ſurrender alſo, would be to determine his will, and relinquiſh his eſtate.

As a tenant at will cannot grant or ſurrender, ſo *à fortiori* cannot a tenant at ſufferance.

Section X. *Of Leaſes by Corporations.*

Kyd on Corp. 259. With reſpect to what acts a corporation aggregate muſt do by deed, and what it may do without deed, it is a queſtion which ſeems by the old books, to have been the ſubject of conſiderable controverſy among the Juſtices. Some go ſo far as to ſay, that without deed, a corporation cannot do any act whatever. One makes a diſtinction, which ſeems to be founded in good ſenſe, between the caſe of a corporation aggregate, conſiſting of many perſons, one capable, and the other incapable, as abbot and convent, and corporations aggregate of many perſons capable, as mayor and commonalty, or dean and chapter: the former, he ſeems to intimate, may do many acts without

out deed, becauſe the abbot is the only perſon capable, and the oracle of the whole, the reſt being incapable of any act, becauſe they are dead in law; but corporations of the other kind being compoſed of perſons, all of whom are capable of action, there is no individual who can be conſidered as the oracle of the whole, and therefore they can ſpeak only by their deed executed in due form.

They can neither make a diſpoſition of their property, nor do any act relating to it, nor receive a grant, without deed: thus they cannot, without deed, make a leaſe for years, nor grant a licence to take away their trees; and if a diſſeiſin be made to their uſe, they cannot agree but by writing under their common ſeal. *Ibid.* 263.

But though they cannot make a leaſe without deed, yet before the ſtatute of Frauds, a leaſe made by them might, without deed, have been granted over by the leſſee.

So, it is ſaid, that if a leaſe for years be made to a corporation who cannot take without deed, and they grant it over, the grantee may entitle himſelf thereto, without ſhewing the deed; becauſe, the leaſe of the thing in its nature, might have paſſed without deed, although the perſons who took it could not take it without deed: alſo, his poſſeſſion is ſome privilege for his title. Cro. Jac 110.

If a leaſe for years be made to a corporation aggregate of many, they cannot make an actual ſurrender thereof, but by deed under their ſeal: but if they accept a new leaſe thereof, this is a ſurrender in law of their firſt leaſe, and may therefore, by the ſtatute of Frauds, be without writing. Bac. Abr. tit. Corporations, (E. 3.)

Though a corporation may employ one in ordinary ſervices without deed, as a butler, cook, *&c.* yet they cannot appoint one to appear for them in an aſſize, or do any other act which concerns their intereſt or title, unleſs it be by deed. *Ibid.*

Therefore, an appointment of an attorney to make, or to take livery of ſeiſin, or the like, without deed, is void. So an appointment to ſeize goods as forfeited to the uſe of the corporation. Kyd on Corp. 261.

Neither can a corporation aggregate, without deed, authorize their ſervant or agent to enter into land on their behalf, for a condition broken; though this does not ſeem *Ibid.* 262.

to have been always free from doubt. In one place it is ſaid, that a man cannot juſtify as ſervant to a corporation, without ſhewing a deed of retainer, and it is contraſted with the caſe of a man avowing as bailiff to a corporation, which may be done without deed. In another place, where it is reported to have been ſaid by *Littleton*, that it was the opinion of all the Judges in the Common Pleas and King's Bench, that an aſſignment of auditors by a commonalty is good without deed, it is added, "and ſo of a juſtification "by their commandment." In a third place, it is ſaid to be the better opinion, that he who pleads the freehold of dean and chapter, and that he entered by their commandment, ought to ſhew a command in writing; and the ſame of a ſervant of mayor and commonalty. In another place, a diſtinction is made between a corporation which has a head, as mayor and commonalty, and a corporation without a head; in the firſt caſe, it is ſaid, that a man may juſtify entering into land by the commandment of the mayor, without writing; in the latter, that a command to enter muſt be by writing.—*Rolle* lays it down as clear law, that "a cor- "poration aggregate cannot command their bailiff to en- "ter into land of their own leaſing for years, for a condi- "tion broken without deed; for ſuch commandment with- "out deed, is void:" and this is conſonant to the principle, that, where the intereſt or title of the corporation is concerned, their officer muſt be appointed by deed.

1 Rol. 514.

It ſeems however to have been generally admitted, that a bailiff might be appointed to take a diſtreſs without deed. It is even ſaid, that "it is not neceſſary that he ſhould be "made bailiff before he diſtrain; it is ſufficient if the cor- "poration agree to it afterwards, for that his being bailiff is "not traverſable, and a member of the corporation may "diſtrain in right of the corporation, and juſtify as bai- "liff." Again, it is ſaid, "a man may juſtify as bailiff to "dean and chapter, and the like, without ſhewing the deed "conſtituting him bailiff:" and in more modern times, it has been laid down as a rule, that "a corporation aggre- "gate may appoint a bailiff to diſtrain without deed or "warrant, becauſe the diſtreſs neither veſts an intereſt in "them, nor deveſts one out of them."

Kyd on Corp. 260.

So,

So, if the ſheriff makes a warrant to a corporation, that hath return of writs to arreſt a man, they may by parol make a bailiff to execute it. Bac. Abr. tit. Corporations. (E. 3.)

Where any perſonal act is neceſſary in the caſe of a corporation, that act muſt be done by attorney appointed by deed under their common ſeal. Kyd on Corp. 268.

Thus, if they accept rent from the aſſignee of a leaſe made by them, that muſt be by warrant of attorney, in order to diſcharge the original leſſee: unleſs the corporation have a particular officer, whoſe buſineſs it is to manage the revenues; as is the caſe of the city of *London*. So, wherever delivery of a deed is thought neceſſary, that muſt be by attorney, who muſt have a letter of attorney for the purpoſe. *Ibid*, 269.

A dean and chapter made a leaſe for three lives, and a letter of attorney to deliver it on the land. *Twiſden* J. thought the letter was void, the leaſe being a perfect leaſe by ſealing, and the delivery afterwards inſignificant; but *Hale* C. J. obſerved, that ſince he had ſate in the Court, it had been ruled, that the latter execution was good, and that the leaſe on being ſealed, was but an eſcrow, where the letter of attorney was delivered at the ſame time. *Ibid*, 270.

On evidence at a trial in ejectment, the caſe was this.— A dean and chapter having a right to certain land, but being out of poſſeſſion, ſealed a leaſe with a letter of attorney to deliver it upon the land, which was done accordingly; and this was held to be a valid tranſaction, on the ground, that though putting the ſeal of a corporation aggregate to a deed be equivalent to a delivery, yet the letter of attorney to deliver it on the land ſuſpends the operation of it till actual delivery of it by the attorney. *Ibid.*

A deed by a corporation out of poſſeſſion, containing a leaſe of land and letter of attorney, is not good under the common ſeal, if the attorney does not deliver it upon the land. Com. Dig. tit. Fait. (A. 4.)

In ejectment, the plaintiff declared upon a demiſe made to him by the aldermen and burgeſſes of ———, without ſetting forth, that it was by deed, or under the ſeal of the corporation, and on a writ of error, it was held well enough; for that this being a fictitious action to try the title, the Carth 390. Cont. Cro. Jac. 613, denied by Holt C. J. to be law, in 1 Ld. Ray. 136.

the demiſe need not now be ſet out to have been made by deed.

It has long been a ſettled maxim, that a corporation cannot appear in court, but by attorney.

Kyd on Corp. 267. Notwithſtanding the general rule, that a corporation muſt appoint their attorney by deed under the common ſeal, they may make an attorney in a court of record, without other writing than the record itſelf; and this is the caſe of the city of *London*, who make an attorney every year in the King's Bench, without either ſealing or ſigning: and the reaſon is, that they are eſtopped by the record to ſay that it is not their act. By an attorney ſo appointed, they may claim liberties.

Bac. Abr. tit. Corporations. (E. 4.) A corporation aggregate may take any chattel, as bonds, leaſes, &c. in its corporate capacity, which ſhall go in ſucceſſion, becauſe it is always in being.

Ibid. But regularly, no chattel ſhall go in ſucceſſion, in caſe of a ſole corporation. By cuſtom, however, it may: as in the inſtance of the chamberlain of *London*.—Therefore, if a leaſe for years be made to a biſhop and his ſucceſſors, and the biſhop dies, this ſhall not go to his ſucceſſors, but to his executors.

This ſubject is connected with that which follows; other information therefore, will be found under the article

Section XI. *Of Leaſes by eccleſiaſtical Perſons.*

Shep. Touch. 281 As to leaſes by eccleſiaſtical perſons; biſhops with the confirmation of the dean and chapter, parſons or vicars with the conſent of their patrons and ordinaries, archdeacons, prebends, and ſuch as are in the nature of prebends, as precentors, chanters, treaſurers, chancellors, and ſuch like; alſo, maſters and governors, and fellows of any colleges or houſes (by what name ſoever called) deans and chapters, maſters or guardians of any hoſpital, and their brethren, or any other body politic, ſpiritual and eccleſiaſtical, *(concurrentibus his quæ in jure requiſuntur)* might by the antient common law have made leaſes for lives or years, or any other eſtates of their ſpiritual or eccleſiaſtical living, for any time without ſuit or limitation.

By the before mentioned ſtatute, of 32 *H.* 8. *c.* 28. biſhops and

and the reſt of the ſaid ſpiritual perſons, (except parſons and vicars) may, at this day, make leaſes of their ſpiritual livings for three lives, or twenty-one years, and ſuch leaſes will be good both againſt themſelves and their ſucceſſors. But, in order to be binding, they muſt have the effect of all the qualities or properties before mentioned and required by the ſaid ſtatute, in the leaſe made by tenant in tail, and be made after that pattern. But with reſpect to the old leaſe being ſurrendered, there is an exception in favour of a biſhop; for if he make a leaſe for twenty-one years to come to one man, and then within a year after make another leaſe to another for twenty-one years, to begin from the making of it, this, ſo as it be confirmed by dean and chapter, is reſolved to be a good leaſe. A leaſe by a biſhop, wherein more than the old rent was reſerved, was held good; two of the Judges however, who were abſent when the caſe was argued, were of a different opinion. 2 Mod. [57.]

Next follows, in order of time, the *diſabling* or *reſtraining* ſtatute, 1 *Eliz. c.* 19. (made entirely for the benefit of the ſucceſſor) which enacts, that all grants by arch-biſhops and biſhops, (which include even thoſe confirmed by the dean and chapter; the which were good at common-law,) other than for the term of one and twenty years, or three lives from the making, without reſerving the uſual rent, ſhall be void. Concurrent leaſes, if confirmed by the dean and chapter, are held to be within the exception of this ſtatute, and therefore valid; provided they do not exceed (together with the leaſe in being) the term permitted by the act. But, by a ſaving expreſsly made, the ſtatute did not extend to any grants made by any biſhop to the crown: the ſtatute 1 *J.* 1. *c.* 3. however, extends the prohibition to grants and leaſes made to the king, as well as any of his ſubjects.—Next comes the ſtatute 13 *Eliz. c.* 10. explained and enforced by the ſtatutes 14 *Eliz. c.* 11 & 14. 18 *Eliz. c.* 11. and 43 *Eliz. c.* 29. which extends the reſtrictions laid by the laſt mentioned ſtatute on biſhops, to certain other inferior corporations, both ſole and aggregate. 2 Bl. Com. 320

From laying all which together, we may collect, that all colleges, cathedrals, and other eccleſiaſtical, or eleemoſynary

nary corporations, and all parſons and vicars, are reſtrained from making any leaſes, of their lands, unleſs under the following regulations: 1. They muſt not exceed twenty-one years, or three lives, from the making. 2. The accuſtomed rent, or more, muſt be yearly reſerved thereon. 3. Houſes in corporations, or market-towns, may be let for forty years; provided they be not the manſion-houſes of the leſſors, nor have above ten acres of ground belonging to them; and provided the leſſee be bound to keep them in repair; and they may alſo be aliened in fee-ſimple for lands of equal value in recompence: therefore, a bond or covenant for rendering or making a leaſe within a city or town, may be enforced. 4. Where there is an old leaſe in being, no concurrent leaſe ſhall be made, unleſs where the old one will expire within three years. Since the ſtatute of Frauds and Perjuries, (29 *C.* 2. *c.* 3.) which requires all ſurrenders to be in writing, it is uſual to have a covenant from the parſon or corporation, to whom the ſurrender is made, that they will, within ſuch a time, make a new leaſe under ſuch and ſuch terms: the ſtatute, however, does not extend to ſurrenders in law, by taking a new leaſe in writing. 5. No leaſe (by the equity of the ſtatute) ſhall be made without impeachment of waſte. 6. All bonds and covenants, tending to fruſtrate the proviſions of the ſtatutes of 13 and 18 *Eliz.* ſhall be void.

Hob. 269.

2 Bl. Com. 320.

Bac. Abr. tit. Leaſes. (E. 3.)

2 Bl. Com. 320.

As to leaſes, therefore, made by parſons, vicars, and others, having benefices or promotions with cure of ſouls, theſe things are to be obſerved; 1. That parſons and vicars are expreſsly excepted out of 32 *H.* 8. *c.* 28. ſo that they are not, as other ſole corporations, enabled by that ſtatute to make any leaſes to bind their ſucceſſors without the confirmation of the patron and ordinary, but remain as they did perfectly at common-law, for any thing in that ſtatute. 2. That they are not reſtrained by 13 *Eliz c.* 10. from making leaſes for twenty one years, or three lives; but then ſuch leaſes muſt not only be confirmed by the patron and ordinary, but muſt alſo be made in conformity to the rules or qualities before mentioned, otherwiſe they will not bind the ſucceſſor. 3. They, as well as others, are reſtrained by 13 *Eliz. c.* 10. from making leaſes for any longer time,

Bac Abr tit. Leaſes, (F.)

time, notwithſtanding any confirmation, or conformity to thoſe rules or qualities.

Another reſtriction occurs with regard to college leaſes, which is created by ſtat. 18 *Eliz. c.* 6. by which it is directed, that one third of the old rent then paid, ſhould for the future be reſerved in wheat or malt, reſerving a quarter of wheat for each 6*s.* 8*d.* or a quarter of malt for every 5*s.* or that the leſſees ſhould pay the ſame according to the price that wheat and malt ſhould be ſold for in the market next adjoining to the reſpective colleges, on the market-day before the rent becomes due. This ſagacious plan is ſaid to have been the invention of Lord Treaſurer *Burleigh*, and Sir *Thomas Smith*, then principal Secretary of State; who, obſerving how greatly the value of money had ſunk, and the price of all proviſions riſen, by the quantity of bullion imported from the newly-found *Indies*, deviſed this method for upholding the revenues of colleges. Their foreſight and penetration have, in this reſpect, been very apparent. The corn rent has made the old rent approach in ſome degree, nearer to its preſent value; otherwiſe, it ſhould ſeem, the principal advantage of a corn rent, is to ſecure the leſſor from the effect of a ſudden ſcarcity of corn. —The leaſes of beneficed clergymen are farther reſtrained, in caſe of their non-reſidence, by ſtats. 13 *Eliz. c.* 20. 14 *Eliz. c.* 11. 18 *Eliz. c.* 11. and 43 *Eliz. c.* 9. which direct, that if any beneficed clergyman be abſent from his cure above fourſcore days in any one year, he ſhall not only forfeit one year's profit of his benefice to be diſtributed among the poor of the pariſh, but that all leaſes made by him of the profits of ſuch benefice, and all covenants and agreements of like nature, ſhall ceaſe and be void; except in the caſe of licenſed pluraliſts, who are allowed to demiſe the living on which they are non-reſident, to their curates only; provided ſuch curates do not abſent themſelves above forty days in any one year. If the curate leaſes over, the leaſe will become void by his abſence, but not by the abſence of the incumbent.—In a late caſe it was determined, where an incumbent had leaſed his rectory, and had been afterwards abſent for more than eighty days in a year, that his tenant could not maintain an ejectment againſt a ſtranger who had got

2 Bl. Com. 322.

Ibid.

Chriſtian's, N. 4.

Gibs. 740.

2 T. R. 749.

got into poſſeſſion without any colour of right or title.—By Lord *Holt*, it was a *quære*, whether a parſon might demiſe all his living, becauſe it might amount to a non-reſidence.

The ſtatute 13 *Eliz. c.* 20. is a general law, and need not be pleaded.

Kyd on Corp. 234, 7. It is a general rule, that a corporation cannot take but by their corporate name. It is alſo a general rule, that it cannot grant but by its proper name of incorporation; though every minute variation in the name is not material to avoid its grant.

Bac. Abr. tit. Leaſes. (E.) At common law, if a parſon had made a leaſe for years of his glebe land, to begin after his death, or granted a rent-charge in that manner, and ſuch leaſe or grant were confirmed by the patron and ordinary, this would have bound the ſucceſſor of the parſon; becauſe here were the conſent and concurrence of all perſons intereſted, and the leaſe or charge bound immediately from the perfecting of the deed by the parſon, patron, and ordinary, though it was not to take effect in poſſeſſion till after the parſon's death: but now, no confirmation whatever will make ſuch leaſe or grant good againſt the ſucceſſor, by reaſon of the ſtatutes made to avoid them.

Ibid. If a perſon obtain a grant to build houſes on church or college lands, which is confirmed, (in caſe where confirmation is neceſſary), yet this grant is no alienation againſt the ſtatutes, but is only a covenant or licence, and nothing elſe; for the ſoil remains in the grantor, and by conſequence the houſes built thereon are in him.

Ibid. (E. 2.) In ſome caſes, the confirmation of the patron is neceſſary, and in ſome not; wherein this diverſity is taken in the books, that ſuch ſole corporations, who have *not* the abſolute fee and inheritance in them, as prebends, parſons, vicars, and ſuch like, if they make any leaſes or eſtates, there in order to bind their ſucceſſors, the patron muſt confirm the ſame: but ſuch ſole corporations who *have* the whole eſtate and right in them, as biſhops, abbots, *&c.* or ſuch corporations aggregate, who have the whole fee and inheritance in them, as dean and chapter, maſters, fellows, and ſcholars of any college, hoſpital, *&c.* theſe may make leaſes to bind their

their ſucceſſors, without any confirmation of the patron or founder, though the biſhop, abbot, dean, maſter, *&c.* were preſentable; and the reaſon of this diverſity appears in the nature of the right with which each is inveſted.

But if a parſonage or vicarage be a donative, then the *Ibid.* confirmation of the patron alone is ſufficient to all leaſes, *&c.* made by the parſon or vicar, and ſhall bind the ſucceſſor without the confirmation of any other.

Yet, if there be a lord-paramount, as well as an immedi- *Ibid.* ate patron, confirmation of the immediate patron, without the other's confirmation, is not good: as if a parſon be patron of the vicarage of the ſame church, and the vicar makes a leaſe confirmed by the parſon and ordinary, this is not good without the confirmation of the patron of the rectory alſo; becauſe both have an intereſt in the poſſeſſions of the vicarage.

As a patron may confirm explicitly by his deed or writ- *Ibid.* ing, ſo may he alſo confirm by conſequence of law; for, if a parſon makes a leaſe for years to the patron, who grants or aſſigns it over to another, this amounts to a confirmation in law by the patron, becauſe a confirmation being nothing but an aſſent under the hand and ſeal of the party confirming, ſuch aſſent in this caſe ſufficiently appears by his aſſigning over the leaſe to another. [By the ſtatute of Frauds, however, all ſuch aſſignments muſt be in writing.]

Another difference obſervable in the manner of confirm- *Ibid.* ing ſuch leaſes as we are treating of, is, as to their duration, or continuance: for, if a parſon make a leaſe for twenty-one years at this day, and the patron and ordinary confirm his eſtate therein for ſeven years, or (after reciting the leaſe) "not beyond," that term, yet is the eſtate or leaſe well confirmed for the twenty-one years; for when they confirm the eſtate of the leſſee, that is intire, and cannot be divided.

As to the eſtate which they who make ſuch confirmation Bac. Abr. tit. ought to have, to make the leaſe effectually binding upon Leaſes. (G. 3.) the ſucceſſors, this regards chiefly the patron, whoſe advowſon or right of patronage, being a temporal inheritance, and conſidered as ſuch, is to be governed by the ſame rules as

other

other temporal inheritances are: his confirmation, therefore, being in nature of a charge upon the advowſon, is to be directed by the eſtate which he hath in the advowſon, and can continue no longer than that endures.

Ibid. If, therefore, the patron had a conditional eſtate in the advowſon, and he confirms a leaſe of the parſon's, and afterwards the condition is broken, this defeats alſo his confirmation, ſo that the ſucceeding incumbent ſhall not be bound by it; for his confirmation, which was in virtue of, and out of, his eſtate in the advowſon, could not be more laſting than the eſtate itſelf was.

Ibid. So, if a church be full of a parſon, and afterwards another is made parſon, and he makes a leaſe for years, which is confirmed by the patron and ordinary, yet the leaſe is void; becauſe he who made it was not parſon, the church being full before.

Ibid. (4.) As to the time of confirmation, generally ſpeaking, it is not material whether it be before or after the making of the leaſe, which is to be confirmed, ſo it be made in the lifetime of the parties who make the leaſe; for the confirmation is but an aſſent or agreement by deed, to the making ſuch leaſe or grant, and not a confirmation of the eſtate itſelf.

Ibid. Thus, where a biſhop made a leaſe to the ſecond of *May*, which was confirmed the third of *May*, and ſealed the fourth of *May*, this was held a good confirmation.

Ibid. Yet, it hath been holden on the contrary, that if a confirmation be made and delivered before the grant or leaſe be confirmed, that this is not a good confirmation; and, though after the grant or leaſe, the deed of confirmation be delivered again, yet that will not make it good; for that it was a deed by the firſt delivery, and the ſecond delivery will not make it good as an aſſent, becauſe the aſſent ought to be by deed, and the firſt delivery was void; but that confirmation may be made before the grant or leaſe be confirmed: the other caſes are expreſs, and the reaſon of the thing ſeems likewiſe to make for it; for the confirmation being nothing but an aſſent or a grant, that the biſhop or parſon may make ſuch leaſe, *&c.* when this aſſent appears

appears under ſeal, and a leaſe, *&c.* made purſuant to it, there can be no reaſon to impeach the leaſe after, which has all the ſanction that the law requires, viz. the concurrence and aſſent of the perſons appointed by law to that purpoſe; and "before," or "after," are only circumſtances of time, which ſeem not material when the aſſent, which is the ſubſtance, ſufficiently appears.

If a biſhop, parſon, or any other ſole eccleſiaſtical corporation, make a leaſe for years, which needs confirmation, this confirmation ought to be made in the life and during the incumbency of the leſſor, for after his death, reſignation, deprivation, or other amotion, the leaſe is become void for want of confirmation; and then, confirmation made after cannot revive it, though it be made in the vacation before any ſucceſſor comes in. *Ibid.*

But if a parſon make a leaſe for years, which is not confirmed by the biſhop or patron, then in being, but by the ſucceeding biſhop and ſucceeding patron, this is a good leaſe, and ſhall bind the ſucceſſor; becauſe the leaſe was abſolutely good againſt the parſon himſelf who made it, and the confirmation was only neceſſary to make it binding on the ſucceſſor, and in this caſe the leaſe being duly confirmed during the incumbency, had all the ſanction the law requires, for there is no prefixed time for the confirmation of ſuch leaſes, ſo it be made during the life and incumbency of the leſſor. *Ibid.*

As to naming the corporation, we ſhall only obſerve, that corporations *aggregate*, as dean and chapter, mayor and commonalty, warden and fellows, *&c.* may make or confirm leaſes, without expreſſing either the chriſtian or ſurname of the dean, mayor, warden, *&c.* becauſe, in their politick capacity, as a corporation aggregate, they continue always the ſame, and are ſaid never to die; but, in leaſes or confirmations by a biſhop, dean, mayor, *&c.* or other *ſole* corporation, both their chriſtian and ſurname, or at leaſt their chriſtian name, ought to be expreſſed, becauſe they are ſubject to death and ſucceſſion, *&c.* and therefore muſt be particularly named, to ſhew whoſe leaſe, *&c.* it was; and ſo, ſome hold too, in the firſt caſe. *Ibid.* (5)

SECTION XII. *Of Leaſes by married Women; and Huſbands ſeiſed in right of them.*

Co.Lit. 3. *a.* If a feme-covert purchaſe lands, without the conſent of her huſband, the conveyance is good, till it be avoided by her huſband.

Ibid. 366. *b.* Therefore, if a demiſe for life, *&c.* with livery, be made to a feme-covert without her huſband, the eſtate is veſted in the wife before the diſagreement of the huſband.

Doug. 452. Hence, in covenant for rent againſt an aſſignee, an aſſignment over before the rent accrued, is a good plea, though the plaintiff reply, that the aſſignee over is a feme-covert.

Co. Lit. 3. *a.* But the huſband, by his diſagreement, diveſts the whole eſtate out of his wife.

Com. Dig. tit. Baron and Feme (P. 1.) If a woman has power to diſpoſe, ſhe may execute her power by conveyance. For the general rule is, that a feme-covert, acting with reſpect to her ſeparate property, is competent to act in all reſpects, as if ſhe were a feme-ſole.

Ibid. (E. 2.) If however a woman be poſſeſſed of a chattel real, by her marriage, the huſband ſhall have it in her right; as if ſhe were poſſeſſed of a term of years.

Ibid. So, if ſhe had the truſt of a term, the huſband ſhall have it, except in ſpecial caſes.—So every chattel real in poſſeſſion.

Ibid. If the huſband ſurvive the wife, he ſhall have the whole intereſt which his wife had in ſuch chattel real; and that without taking out adminiſtration to her. So, of a copyhold for years.

Ibid. So, the huſband in his life-time may diſpoſe of all his wife's intereſt in ſuch chattel real, by grant, or demiſe. So the intereſt of a term, *&c.* which they have jointly.

Ibid. So, he may grant it upon condition, which will be a diſpoſition, though the executor enter for the condition broken.

Ibid. So, if the huſband recover the term in ejectment in his own name, it is a diſpoſition.

Ibid. So, the huſband may diſpoſe of part of his wife's intereſt; as he may demiſe for part of the years rendering rent, and the rent ſhall go to his executor or adminiſtrator, though the wife ſurvive.

So,

So, he may make a lease to commence after his death, and it will be good, though the wife survive; for, having an interest to dispose of in his life, he might dispose of all the term, and it should bind the feme; so, when he hath disposed by an act executed in his life of the interest of the term, and hath created a term in interest, this is as good as if he had granted all the term. *Ibid.* 1 Cro. Elis. 287.

But, if the wife had only the possibility of a term, the husband cannot dispose of it; as if there be a lease to husband and wife for their lives, and afterwards to the executor of the survivor, the husband cannot grant this executory interest. Com. Dig. *ut ante.*

So, if a woman be dispossessed of a term, and takes husband, and dies before recovery of the possession, the husband shall not have it. *Ibid.*

So, if the husband does not dispose of the chattel real of his wife, if she survive him she shall have it.

So, all that was not disposed of by the husband; as if a term be demised by the husband for part of the years, the wife shall have the residue. So, if he demise, reserving part, the wife shall have the part excepted.—If he demise the term "if *A.* so long live," she shall have the possibility. So, if the term be extended the wife shall have it after the extent satisfied. So, if the husband and wife mortgage the term, and the husband pay the money, and enter and die, the wife shall have it. *Ibid.*

It is clearly agreed, that if a husband seised of lands in right of his wife, make a lease thereof by indenture or deed-poll, reserving rent, that this is a good lease for the whole term, unless the wife by some act after the husband's death shews her dissent thereto: for if she accept rent which becomes due after his death, the lease is thereby become absolute and unavoidable; the reason whereof is, that the wife after her intermarriage being by law disabled to contract for or make any disposition of her own possessions, as having subjected herself and her whole will to the will and power of her husband, the law thereupon transfers the power of dealing and contracting for her possessions to the husband, because no other can intermeddle therewith, and without such power in the husband they would be obliged Bac. Abr. tit. Leases (C. 1.)

to keep them in their own maintenance and occupation, which might be greatly to the prejudice of both: but to prevent the huſband's abuſe of ſuch power, and leſt he ſhould make leaſes to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good ſuch leaſe, or to defeat and avoid it, as ſhe finds moſt ſubſervient to her own intereſt: and this ſhe may do though ſhe joined in ſuch leaſe, unleſs made purſuant to the ſtatute 32 *H.* 8. *c.* 28.

Ibid. If a widow chuſes to avoid ſuch leaſe, notwithſtanding her having joined therein, then it is ſo abſolutely defeated *ab initio* as to her, that ſhe may plead *non demiſit*; becauſe, as to any intereſt that paſſed from her, ſhe did not demiſe, nor in truth had any power to contract, but the whole intereſt paſſed from the huſband, and the leſſee is in merely by virtue of the huſband's contract; and yet becauſe the leſſee by his acceptance of ſuch leaſe admitted them both to have power to join therein, he muſt accordingly during the coverture declare of the leaſe by them both as an eſſential part of the deſcription of the leaſe whereby he makes title.

Ibid. But the indenture or deed-poll, whereby ſuch leaſe was made, being no eſſential part either of the deſcription or leaſe itſelf, becauſe the huſband during the coverture might have made it by parol only; therefore it is not neceſſary nor uſual for the leſſee in his declaration to make any mention thereof.

Cro. Jac. 617. A leaſe made by huſband and wife of the lands of the wife, and delivered by letter of attorney in both their names, will ſupport a declaration in ejectment on a leaſe by the huſband only; for the delivery by attorney being void as to the wife, it is the leaſe of the huſband only.

Bac. Abr. *ut ante.* But if the huſband and wife join in a leaſe for years by parol of the wife's lands rendering rent, or if the huſband ſolely make ſuch parol leaſe, rendering rent, this determines abſolutely by his death, ſo that no acceptance of rent, or other act done by the wife, will prevent its avoidance: for a leaſe for years being an immediate contract for or diſpoſition of the land itſelf, if the ſame appears in writing duly executed, ſo that there can be no variation or deviation therefrom

therefrom attempted by the lessee after the husband's death; the law so far gives countenance to such lease for the encouragement of farmers and husbandmen, that the same shall continue in force till the wife's actual dissent or disagreement thereto; but, because there can be no such certainty of the terms of a parol lease, when nothing appears in writing to manifest them, therefore they, like other charges of the husband, fall off and drop with his estate or interest therein.

If the husband and wife make a lease for years of the wife's land, without reservation of any rent, yet it hath been adjudged that this is a good lease by them both during the coverture, and that the wife, after the husband's death, may affirm the same by acceptance of fealty, or bringing an action of waste: so that the reservation of rent is not essential to the existence or continuance of such lease after the husband's death, but only a writing attesting the same, and the wife's allowance and approbation thereof; for as the husband made such lease at first without any reservation of rent, so the wife, if she thinks fit, may continue the lessee in possession after his death upon the same terms. Bac. Abr. tit. Leases, (C. 1.)

If a husband seised of a copyhold in right of his wife, make a lease not warranted by the custom, it is a forfeiture of the estate during the life of the husband only; for it is not a continuing detriment to the inheritance, or such an act as tends to the destruction of the manor, in which case it would bind the inheritance of the wife after the husband's death. *Ibid.* & Cro. Car. 7.

A husband letting copyhold lands, of which he is seised in right of his wife, by indenture, will not destroy the custom of demising by copy, because the wife may enter after his death and avoid such lease. *Ibid.* Cro. Eliz. 459.

A woman guardian in socage, marries and joins with her husband by indenture in making a lease for years of the ward's lands, yet after her husband's death she may avoid the same in right of the infant whose guardian she still continues to be, and to whom, when he comes of age, she must be accountable for the profits. *Ibid.*

A man possessed of a term of years in right of his wife, as executrix of her former husband, has power to grant and convey the same. 3 Wilf. 277.

Cro. Jac. 99. But a huſband ſeiſed in right of his wife cannot grant copies in his own name, but the wife ought to join.

9 Mod. 43. A huſband, in whom a long term of years was veſted in right of his wife, made an under-leaſe for ten years, and upon borrowing money of the leſſee covenanted to grant him another leaſe after the end of the ten years, and to continue during the time he had any right, but died before he made ſuch leaſe; it was decreed to be a good diſpoſition of the term in equity.

Shep. Touch. 280 Touching leaſes made by huſband and wife, purſuant to the ſtatute 32 *H.* 8. *c.* 28. [concerning which ſtatute ſee *ante* p. 38.] the huſband may at this day, without fine or recovery, make leaſes of the lands, tenements, or hereditaments, whereof he hath any eſtate of inheritance in fee-ſimple or fee-tail in right of his wife, made before or after the coverture, ſo as there be in ſuch leaſes obſerved the conditions or limitations before required in the leaſes made by tenant in tail; and ſo that the wife join in the ſame deed, and be made party thereunto, and ſeal and deliver the ſame deed herſelf in perſon: for if a man and his wife make a letter of attorney to another to deliver the leaſe upon the land, this leaſe is not a good leaſe from the wife warranted by the ſtatute; and yet then, as in other like caſes, of leaſes not warranted by the ſtatute, it is a good leaſe againſt the huſband. When the leaſe is ſuch an one as is warranted by the ſtatute, it binds the huſband and wife both, and the heirs of the wife; but if it be an eſtate-tail, it doth not bind the donor nor him in remainder.

Bac. Abr. tit. Leaſes (C. 1.) Huſband and wife, the huſband purchaſed land to him and his wife and their heirs, and afterwards he, without his wife, lets this land for ſixty years, if they ſhould ſo long live, rendering 280*l. per ann.* rent at the two uſual feaſts, during the term, then the huſband dies, and if this leaſe ſhould bind the wife by the 32 *H.* 8. *c.* 28. was the queſtion; and it was held by three juſtices that it ſhould: for the wife is appointed to join only when ſhe hath the ſole inheritance by the appointment of the rent to be reſerved to the heirs of the wife, and not when ſhe hath a joint-eſtate, as in this caſe; and then clearly by the body of the act, the leaſe by the huſband ſolely is good, and the proviſo does not extend

to

to it; in truth, the leaſe determined by the death of either of them.

Section XII. *Of Leaſes by Infants and Guardians.*

Of Infants.

With reſpect to the power that an infant poſſeſſes to grant a leaſe that ſhall be binding, the caſes in the books are ſomewhat contradictory, and the point is hitherto unſettled. The better opinion however ſeems to be, that leaſes made by infants are not abſolutely void, but voidable on their attaining their majority.

Perk. s. 12. "All gifts, grants, or deeds, made by infants, by matter in "deed, or in writing, which do take effect by delivery of "his hand, are voidable by himſelf, by his heirs, and by "thoſe who have his eſtate." The words "do take ef-"fect," are an eſſential part of the definition, and exclude 3 Bur. 1804. letters of attorney, or deeds which delegate a mere power and convey no intereſt.

Bac. Abr. tit. Leaſes (B) All the books agree, that if an infant make a leaſe for years, he cannot plead *non eſt factum*, but muſt avoid it by pleading the ſpecial matter of his infancy; which favours the opinion of thoſe who hold, that the leaſe is not abſolutely void; for if it were abſolutely void, there is no good reaſon why he ſhould not plead *non eſt factum*, as a feme-covert certainly may do in ſuch caſe, whoſe leaſe is abſolutely void, ſo that no acceptance of rent after her huſband's death can make it good.

Bull. N. P. 177. Cro. Jac. 320. *ſ. c.* In debt for rent the defendant pleaded infancy at the time of the leaſe made; and upon demurrer, the Court held the leaſe *voidable* only at his election; for if it were for his benefit, it ſhall be no ways void, but the infant at his election may make it void, by refuſing and waiving the land before the rent-day comes; in which caſe no action of debt would lie againſt him; but the defendant not having ſo done, and being of age before the rent-day due, and it not being ſhewn to the court that in this caſe the rent was of greater value, the plaintiff had judgment.

Bac. Abr. tit. Leaſes (B.) But if an infant, poſſeſſed of a term of years, ſell it for money, and after he comes of full age, receives part of the

money for it, he ſhall avoid the grant notwithſtanding; for the contract, as ſaid, being void in the commencement, cannot be made good by any ſubſequent act.

Ibid. An infant made a leaſe for years, and at full age, ſaid to the leſſee, "God give you joy of it;" this was holden by *Mead* a good affirmation of the leaſe; for this is a uſual compliment to expreſs one's aſſent and approbation of what is done.

3 Bur. 1806. What ſeems deciſive upon the queſtion, is that "leſſee "can in no caſe avoid the leaſe, on account of the infancy "of the leſſor;" which ſhews it not to be void, but voidable only; and it is better for infants that they ſhould have an election.

Ibid. It has long been ſettled that "an infant may make a leaſe "without rent to try his title." In truth, very prejudicial leaſes may be made, though a nominal rent be reſerved, and there may be moſt beneficial conſiderations for a leaſe, though no rent be reſerved.

Bac. Abr. tit. Infancy & Age, (C.) An infant is bound by all conditions, charges, and penalties, in an original conveyance, whether he comes to the eſtate by grant or deſcent, becauſe the eſtate *tranſit cum onere*, and therefore, if the infant will have the eſtate, he muſt obſerve the condition upon which it was granted.

2 Vern. 224. The court of Chancery will decree building leaſes for ſixty years of infants' eſtates, when it appears to be for their good.

Cro. Car. 306. Where an infant makes a leaſe for years, reſerving rent, and the leſſee enters, the infant hath election to allow him to be his tenant, or to be his diſſeiſor, whichever is moſt to his advantage; ſo, where one enters and claims as guardian, and occupies, the infant may allow him to be either diſſeiſor, or accomptant, whichever ſhall be for his beſt advantage.

Of Guardians Bac. Abr. tit. Leaſes (I. 9.) A *guardian in ſocage* may make leaſes for years in his own name, and the leſſee may maintain ejectment thereupon; for this guardian is a perſon appointed not by any ſpecial deſignation of the party, but by the wiſdom of the law, in reſpect of the lands deſcended to the infant, ſo that where no lands deſcend, there can be no ſuch guardian: and his office originally was to inſtruct the ward in the arts of tillage

Cro. Jac. 99.

and

and huſbandry, that when he came of age he might be the better able to perform thoſe ſervices to his lord, whereby he held his own land; and though the office now be in ſome meaſure changed, as the nature of the tenure itſelf is ſince the time that the ſocage tenants bought off their perſonal labours and ſervices with an annual rent to the lord, yet it is ſtill called ſocage tenure, and the guardian in ſocage is ſtill only where lands of that kind (as moſt of the lands in England now are) deſcend to the heir within age: and though the heir after fourteen may chooſe his own guardian, who ſhall continue till he is twenty-one, yet as well the guardian before fourteen, as he whom the infant ſhall think fit to chooſe after fourteen, are both of the ſame nature, and have the ſame office and employment aſſigned to them by the law, without any intervention or direction of the infant himſelf; for they were appointed, becauſe the infant, in regard of his minority, was ſuppoſed incapable of managing himſelf and his eſtate, and conſequently derive their authority, not from the infant, but from the law; and that is the reaſon they tranſact all affairs in their own name, and not in the name of the infant, as they would be obliged to do, if their authority were derived from him. Indeed, if their authority were derived from him, it would by no means anſwer the intention of the law in appointing them; for then all acts done by virtue of ſuch derivative authority could be of no more force than if done by the perſon himſelf who gave that authority, ſince none can communicate more power to another than he has himſelf; and that would invalidate all their contracts, and make them ſavour of the ſame imbecility as if made by the infant himſelf.

Therefore, to enable them to take eſpecial care of the infant and his affairs, the law has inveſted them, not with a *a bare authority* only, but alſo with *an intereſt*, till the guardianſhip ceaſes; and to prevent their abuſe of this authority and intereſt, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit; and therefore their authority and intereſt extend only to ſuch things as may be for the benefit and advantage of the infant, and whereof they may give an account,

From

Ibid. From what has been ſaid, it appears that a guardian in ſocage hath, not only *a bare authority*, but *an intereſt* in the lands deſcended, and therefore during that time may make leaſes for years in his own name, as any other who hath an intereſt in lands may do; for he is *quaſi dominus pro tempore*. If he makes leaſes for years to continue beyond the time of his guardianſhip, ſuch leaſes ſeem not to be abſolutely void by the infant's coming of age, but only voidable by him, if he thinks fit; for they are not derived barely out of the intereſt of the guardian, or to be meaſured thereby, but take effect alſo by virtue of his authority, which for the time was general and abſolute; and therefore all lawful acts done during the continuance of that authority, are good, and may ſubſiſt after the authority itſelf, by which they were done, is determined, and conſequently the infant, when he comes of age, may by acceptance of rent, or other act, if he thinks fit, make ſuch leaſes good and unavoidable.

A teſtamentary guardian, or one appointed purſuant to the ſtatute 12 *Car.* 2. *c.* 24. *ſ.* 8. 9. 10. 11. is the ſame in office and intereſt as a guardian in ſocage.

Ibid. But a guardian by nurture cannot make any leaſes for years, either in his own name, or in the name of the infant, for he hath only the care of the perſon and education of the infant, and hath nothing to do with the lands merely in virtue of his office; for ſuch guardian may be, though the infant has no lands at all, which a guardian in ſocage cannot. But

8 Mod. 312. ſuch guardian, it ſeems, may make leaſes at will. Though every guardian, except a guardian in ſocage, is but tenant at will, and by conſequence cannot make a leaſe for any certain time or number of years; yet if a leaſe be made by ſuch guardian, the leſſee is eſtopped to ſay, that being only tenant at will, he had no power to make the leaſe.

3 P. Wms. 101. & n. 1. A leaſe renewed by a guardian for an infant's benefit ſhall follow the nature of the original leaſe: and in general a guardian or truſtee ſhall not alter the nature of the infant's property, ſo as to change the right of ſucceſſion to it in caſe of the infant's death, unleſs by ſome act manifeſtly for the advantage of the infant at the time.

A guardian

A guardian in ſocage may hold a court in his own name, and grant copyholds, and the grant ſhall bind the heir. Cro. Jac. 99.

Section XIII. *Of Leaſes by Executors or Adminiſtrators.*

Executors and adminiſtrators, as they may diſpoſe abſolutely of terms of years veſted in them in right of their teſtators, or inteſtates; ſo may they leaſe the ſame for any fewer number of years, and the rent reſerved on ſuch leaſes ſhall be aſſets in their hands, and go in a courſe of adminiſtration. Bac. Ab. tit. Leaſes (I 7.)

So, where leſſee for fifty years of a reverſion expectant upon a leaſe for life, makes his will in writing, and thereof appoints one *B.* his ſon, an infant of three years of age, executor, and dies, adminiſtration is granted to *C.* during the minority of *B.* generally, then *C.* makes a leaſe for ten years, without reſerving any rent for aught appears, and yet this leaſe was held good: becauſe, by the eccleſiaſtical law, a minor under ſeventeen years old, cannot be admitted to be executor, and therefore, adminiſtration being granted generally during his minority, the whole term and power of diſpoſing thereof for that time veſts as abſolutely in the adminiſtrator, as it would have done in the executor himſelf, if he had been of an age capable of acting therein; becauſe, for that time the teſtator died, *quaſi inteſtatus*, and the adminiſtrator for that time, hath the ſame power as if he had actually died inteſtate; and therefore, ſuch leaſe is good, at leaſt till the executor attain his age of ſeventeen years, when ſuch adminiſtration ceaſes; and ſome held, that ſuch leaſe would hold good after, till the executor avoided it by actual entry, by reaſon of the general power which ſuch adminiſtrator had in the mean time; and therefore ſuch continuing acts are not *ipſo facto* determined by the ceaſing of the adminiſtration, but are only voidable in the ſame manner as other leaſes would be, *viz.* by an entry of the executor, when he comes to take upon him that office. But, if the adminiſtration had been ſpecial *ad opus, commodum, et utilitatem*, of the executor during his minority, *et non aliter, nec alio modo*, then none could make title by virtue of ſuch a leaſe made by ſuch ſpecial adminiſtrator, even during the minority of the executor; becauſe, the *Ibid.*

nature

nature and manner of the adminiſtrator's power appearing in the very title which the leſſee muſt make to ſuch leaſe, this leaſe would appear not to be purſuant thereto, becauſe it could not be of neceſſity, nor for the uſe or advantage of the infant, ſince it could not take effect during the life of the tenant for life; and therefore ſuch leaſe would be condemned, as void preſently.

3 Wils. 3. An aſſignee of a leaſe, aſſigned to him by an adminiſtrator, is not obliged, it ſhould ſeem, to make a *profert in curiam* of the letters of adminiſtration.

SECTION XIV. *Of Leaſes by Mortgagees; wherein of Mortgages generally.*

2 Bl. Com. 158. A mortgage is where a man borrows of another a ſpecific ſum, and grants him the freehold, or the inheritance, on condition, that if the mortgagor ſhall repay the mortgagee the ſaid ſum on a certain day mentioned in the deed, that then the mortgagor may re-enter on the eſtates ſo granted in pledge; or as is now the more uſual way, that then the mortgagee ſhall re-convey the eſtate to the mortgagor. In this caſe the land, ſo put in pledge, is, by law, in caſe of non-payment, at the time limited, for ever dead and gone from the mortgagor: and the mortgagee's eſtate in the lands is then no longer conditional, but abſolute: but, ſo long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage.

Ibid. A ſecond ſort of mortgages however, has been adopted, in preference to the preceding kind, which were attended with certain inconveniences as to doubts about dower and other incumbrances of the mortgagee; and it has become uſual to grant only a long term of years by way of mortgage, with condition to be void upon re-payment of the mortgage-money: which courſe is now frequently uſed; principally becauſe on the death of the mortgagee, ſuch term becomes veſted in his perſonal repreſentatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

Powell on Mort. 25. For every thing which may be conſidered as property, whether, in the technical language of the law, it be denominated real or perſonal property, may be the ſubject of a mortgage.

All lands therefore are in reſpect of their intrinſic nature mortgageable; but, notwithſtanding they are ſo mortgageable, yet in reſpect of the eſtate and property that the owner has in them, they may be otherwiſe; as if he be but tetant at will of them. *Ibid.* 26.

As to the eſtate in lands, tenements, and hereditaments, neceſſary to make good a mortgage, it may be obſerved, that any eſtate which a man has in fee-ſimple, fee-tail, for life, or years, in any lands, or in any rent, or profit out of the ſame, may be mortgaged.—If tenant in tail, and the next in remainder in fee, join in a mortgage, and after the tenant in tail dies without iſſue, in this caſe it is a good mortgage againſt him in remainder.—So, if there be joint tenants, either of them may mortgage his undivided part or ſhare; and the law is the ſame in reſpect to tenants in common, parceners, &c. *Ibid.*

The common method of mortgaging now is, by a demiſe of the land for a term, under a condition to be void on the payment of the mortgage money and intereſt, with a covenant inſerted at the end of the deed, that until default ſhall be made in the payment of the money, the mortgagor ſhall receive the rents, iſſues, and profits, without account: this has been ruled to create a tenancy at will to the mortgagee; but, if the mortgagor dies, the tenancy at will is determined till there is a receipt of intereſt from the heir, which ſeems to make him alſo tenant at will of the mortgagee. It is now uſual, alſo, to inſert in the mortgage deed of a term of years, or the aſſignment thereof, a covenant from the mortgagor for himſelf and his heirs, that if default be made in the payment of the money at the day, then he and his heirs will, at the coſts of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to ſuch perſon or perſons (to prevent merger of the term,) as he or they ſhall direct or appoint. Bac. Abr. tit. Mortgage (4.)

With reſpect to the eſtate which the mortgagor has in the land from the time of making the mortgage.

A mortgagor has often been called a tenant at will to the mortgagee in courts of law and equity, but perhaps inaccurately ſo, and the expreſſion has been uſed, when it 1 T. R. 382.

was

was not very material to aſcertain what his power and intereſt were, or to ſettle with any great preciſion in what reſpects he did, and in what reſpects he did not, reſemble a tenant at will. To many purpoſes he is like tenant at will; but he does not pay rent; he muſt pay intereſt only.

Ibid. 383. Doug. 23. The poſſeſſion of the mortgagor, is the poſſeſſion of the mortgagee, and as to the inheritance, they have but one title between them. The mortgagor has no power of making leaſes to bind the mortgagee; but may be conſidered as receiving the rents in order to pay the intereſt by an implied authority from the mortgagee, till he determine his will.

Cro. Jac. 659. If a mortgage be made by bargain and ſale, with a proviſo and agreement between the parties, that the mortgagee, his heirs, and aſſigns, "ſhall not intermeddle with the actual "poſſeſſion of the premiſſes, or perception of the rents," until default of payment, the mortgagor is a tenant at ſufferance to the mortgagee, and not a tenant at will, as he would have been on a covenant that he ſhould take the profits till default of payment.

Ibid. 660. If, therefore a mortgagor, who continues in poſſeſſion by conſent of the mortgagee, makes a leaſe for years, and the leſſee enter, claiming nothing but his leaſe, he is not a diſſeiſor, but on payment and acceptance of his rent, a tenant at will; and if the mortgagor enter after the expiration of the leaſe, he ſhall be tenant at will again to the mortgagee; and his acts, being by permiſſion of the mortgagee, ſhall not turn to his prejudice,

If the mortgagee aſſigns a term conveyed to him by way of mortgage, with a clauſe, that the mortgagee ſhall retain the poſſeſſion, without the mortgagor joining in, and being a party, the aſſignment determines the ſimilarity of his eſtate to an eſtate at will, and makes the mortgagor in the nature of a tenant at ſufferance.

Doug. 610. Until foreclоſure, a mortgagor is conſidered by a court of equity as the real owner of the eſtate, and the mortgagee as having but a chattel intereſt by way of mortgage as a ſecurity merely; ſo a mortgagor has a right of poſſeſſion till the mortgagee brings an ejectment at law.

Pow. on Mort. 227. It follows, from hence, that all leaſes, or other intereſts in the land, made or conveyed by the mortgagor, ſubſequent to

to the mortgage, and before the foreclosure, are void againſt the mortgagee; and as to him, the tenants under ſuch leaſes, or perſons claiming ſuch intereſts, may be conſidered as treſpaſſers, diſſeiſors, and wrong-doers.

The mortgagee therefore cannot, before foreclosure of the equity of redemption, make a leaſe for years of a houſe in mortgage to bind the mortgagor; unleſs to avoid an apparent loſs and merely in neceſſity. Indeed, if it were otherwiſe, it would be in the power of the mortgagee effectually to bar the mortgagor the benefit of redemption at his pleaſure, by granting beneficial leaſes on fines: beſides, if ſuch leaſes were held good, it would be difficult for the mortgagor to recover any rent, though the principal and intereſt ſhould be paid; as, not claiming under the eſtate of the mortgagee, he cannot have any benefit of the leaſe made by him, for he is neither party to the deed, nor privy to the eſtate.

9 Mod. 1.

1 Pow. on Mort. 248. Doug. 22.

But where there is a leaſehold eſtate that is mortgaged, and no covenant on the part of the mortgagor that he will procure the lives to be filled up, the mortgagee cannot compel him to do it, but muſt pay the expence of renewing, and then reimburſe himſelf, by adding it to the principal of the mortgage, and it ſhall carry intereſt.

3 Atk. 4.

Where the mortgagor is himſelf the occupier of the eſtate, he may be conſidered as tenant at will; but he cannot be ſo conſidered if there be an under-tenant, that is a tenant in poſſeſſion under a leaſe prior to the mortgage; for there can be no ſuch thing as an under-tenant to a tenant at will; the demiſe itſelf would amount to a determination of the will.

Doug. 283.

Therefore, where there is ſuch tenant in poſſeſſion, the mortgagor is only a receiver of the rent for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay the rent to him any longer.

Ibid.

It is clear, that if the mortgagee enters into poſſeſſion, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and enjoying the profits he muſt ſubmit to the loſſes: and no ſituation is more irkſome and diſadvantageous than that of a mortgagee in poſſeſſion; inaſmuch

1 Pow. on Mort. 243.

Per Ld. Kenyon C. J. in Cheſeman v. Broughton, in K. B. Eaſt. T. 35 G. 3.

much as he muſt pay himſelf as he can out of the rents and profits, and is, beſides, compellable to account for thoſe rents and profits.

3 T. R. 393. If mortgagor and mortgagee make a leaſe in which the covenants for the rent and repairs are only with the mortgagor and his aſſigns, the aſſignees of the mortgagee cannot maintain an action for the breach of theſe covenants on ſtat. 32 *H.* 8. *c.* 34. becauſe they are collateral to his grantor's intereſt in the land, and therefore do not run with it.

3 T. R. 678. If mortgagor of a term join with the mortgagee in a leaſe for a ſhorter term, in which the covenants for the rents and repairs are only with the mortgagor and his aſſigns, and the intereſts of the mortgagor and mortgagee become extinguiſhed during the leaſe by the reverſioner acquiring their eſtates, ſtill the mortgagor may maintain an action of covenant againſt the leſſee, the covenants being in groſs.

Pow. on Mort. 233. A court of equity refuſed on bill to compel an aſſignee of a term on mortgage to diſcover his aſſignment; the object of the leſſor in requiring it being to make him liable to the covenants of the mortgagor, although he had not taken actual poſſeſſion of the premiſes. The Court diſmiſſed the bill, and left the party to his remedy at law.

Ibid. 234. But in a ſubſequent caſe, where one hundred pounds were lent by way of mortgage upon an aſſignment of a building leaſe, and the mortgagee never entered nor took poſſeſſion, but loſt the money lent; the defendant in equity having recovered againſt the mortgagee, as aſſignee, the rent reſerved on the leaſe, the bill was to be relieved againſt the recovery at law; and the Court diſmiſſed it, ſaying, the mortgagee was ill adviſed to take an aſſignment of the whole term.

Doug. 455. However, upon re-conſideration of this queſtion in the caſe of *Eaton* againſt *Jacques*, it was determined that a mortgagee, aſſignee of a term for years, ſhould not be liable to the covenants in the caſe, unleſs he had taken actual poſſeſſion. Mr. *Powell*, in his excellent treatiſe on this ſubject, ſtates the authority of *Eaton* and *Jacques* to have been twice denied at Sittings by Lord *Kenyon*, as he has been informed;

That

That the aſſignee is liable only in reſpect of actual poſ- 1 Pow. on Mort. 241.
ſeſſion is certainly contradicted by a caſe which aroſe on a bill by the executor of a leſſor againſt the depoſitary of a leaſe to ſecure to him a debt, for the ſpecific performance of a covenant to re-build houſes upon the premiſſes in the eleventh year of the term, which was a term of 71 years; to be held for the firſt ten years at a pecuniary rent, for the eleventh year at a pepper-corn rent, and for the reſt of the term at a pecuniary rent. The defendant, by his anſwer, ſtated the fact of the diſpoſal by way of mortgage, and inſiſted that having no title but as mortgagee, he was not bound to rebuild. Lord *Thurlow* (Chan.) thought that there could not be a decree to rebuild, as he could no more undertake the conduct of a rebuilding than of a repair. But his lordſhip ſaid, it was no matter whether the defendant took it as a pledge, or as a purchaſe, for he could not take the eſtate as a ſecurity, and refuſe the burthen that was upon it; but having once taken it, he could not abandon it: that being then only an aſſignee in equity, no action could be brought, and that the only relief that he could give the plaintiff, as he could not give him damages, was to put him in a ſituation to recover them; his lordſhip therefore decreed, that the defendants ſhould take an aſſignment of the leaſe and execute a counterpart, and that they ſhould pay the coſts.

A mortgagee in poſſeſſion is not obliged to lay out money 3 Atk. 518.
any farther than to keep the eſtate in neceſſary repair: but if he has expended any ſum in ſupporting the right of the mortgagor to the eſtate, where his title has been impeached, the mortgagee may certainly add that to the principal of his debt; and it ſhall carry intereſt.—If the eſtate lies at ſuch a diſtance that he muſt employ a bailiff to collect the rents, what he paid to the bailiff ſhall be allowed; but not where he does or may receive the rents himſelf.

Accepting a mortgage does not, it ſeems, eſtop the mort- 1 Pow. on Mort.
gagee from ſaying that the mortgagor had no eſtate in the 282.
premiſſes mortgaged. But a mortgagor is never permitted Cowp. 602.
to diſpute the title of his mortgagee; becauſe no man is permitted to diſpute his own ſolemn deed.

Bac. Abr. tit. Leaſes (O.)

If *A.* mortgage land to *B.* upon condition to re-enter on payment of 10*l.*; and afterwards *A.* before the day of payment is come, being in poſſeſſion, make a leaſe for years by indenture to *C.* and then afterwards performs the condition, this ſhall make the leaſe to *C.* good againſt himſelf by eſtoppel.

SECTION XV. *Of Leaſes by Tenants by Elegit, Statute-Merchant, and Statute-Staple, &c.*

Leaſes by tenants under theſe executions are conditional, and may be aſſimilated to tenancies at will; as they may be determined by payment of the ſum for which they are created. Till ſuch contingency occurs, however, they remain as valid as any other demiſes.

Co. Lit. 58. *b.* Cro. Jac. 99.

Therefore, tenant by ſtatute-merchant, ſtaple, and *elegit* may not only make voluntary admittances to copyholds, but grant copies of copyhold lands which come into their hands. *Tamen quære?* for copyholds are not within any execution, except that ſort that is conſtituted by a commiſſion of bankrupt.

Shep. Touch. 242. 5 Co. 17. *a.* 1 Eſp. Dig. 293.

The intereſt or eſtate that a man hath by extent is aſſignable from man to man at pleaſure. Therefore, tenant by ſtatute-merchant, ſtatute-ſtaple, or *elegit*, or he who purchaſes a leaſe for years ſold under an execution, are aſſignees.

4 Mod. 48.

But if the conuſee of a ſtatute ſue out an extent, and a *liberate* is returned, yet if he ſuffer the conuſor to keep poſſeſſion he cannot aſſign the lands; for his poſſeſſion under the *liberate* is, by his own entry, turned to a right, and a right is not aſſignable.

Cro. Jac. 424.

If the firſt conuſee take a leaſe of the reverſion, his extent is ſuſpended during the term; and although he aſſign the leaſe, a ſecond conuſee may extend the land.

SECTION XVI. *Of Leaſes by Copyholders; wherein of Licence.*

Cro. Jac. 403. Cro. Car. 233. Cro. Eliz. 422, 535, 718.

A copyholder may make a leaſe for one year without a licence, and thereupon may maintain an ejectment.

Com. Dig. tit. Copyhold (K. 3.)

By ſpecial cuſtom a copyholder may make leaſes for three, nine, or twenty-one years, or for life and forty years after, without licence from the lord; upon which alſo he may maintain an ejectment.

But

But a cuſtom that the leaſe ſhall be void if the leſſor dies, is good; though not if the leſſor alien. *Ibia.*

A leaſe for years, however, without licence from the lord, is not good without a ſpecial cuſtom, though the leaſe be made without indenture by parol, or be not in poſſeſſion but to commence *in futuro*; and ſuch leaſe is a forfeiture, for it is a good leaſe between the parties. *Ibid.*

A cuſtom that leſſee for life ſhall make a leaſe for the life of another, is void. *Ibid.*

Although a leaſe for a year, without licence, be good, yet a leaſe for one year *et ſic de anno in annum* during ten years, being a good leaſe for ten years, is a forfeiture: but otherwiſe of a leaſe for one year, with a covenant for the holding it for a longer time at the will of the leſſor. So a leaſe for a year *et ſic de anno in annum* for the life of the leſſee, being a leaſe for two years at leaſt, is not good. So, if *de anno in annum*, excepting one day in every year; for it is a certain leaſe for two years, excepting two days, which is a leaſe in effect for more than one year; and although there be the intermiſſion of a day, yet that is not material. Cro. Jac. 301.

So, if a copyholder make three leaſes together, each to commence within two days after the expiration of the other, it is a mere evaſion of the cuſtom, and therefore not good. Cro. Car. 233.

So, if a copyholder, to ſecure a perſon who has become bound for him, covenant that ſuch perſon ſhall hold and enjoy the copyhold eſtate for ſeven years, and ſo from ſeven years to ſeven years, for the term of forty-nine years if the copyholder ſo long live, it is a forfeiture of the eſtate; though there is a clauſe that the deed ſhould be void on the bond being paid; for this deed, though intended only as a collateral ſecurity, amounts to a preſent leaſe. 2 Mod. 79.

A copyholder, having licence to leaſe, ought to purſue his licence ſtrictly; otherwiſe his leaſe is void. Com. Dig. *ut ante.*

As, if he has a licence to leaſe for twenty-one years from *Michaelmas* laſt, and he leaſes for twenty-one years from *December* next. So, if he has a licence to leaſe for two years, and he leaſes for three years. So, if a copyholder in fee has a licence to leaſe for years, if he ſo long live, and he leaſes for years abſolutely. *Ibid.*

Ibid. So, a copyholder having licence to make a leaſe for twenty-one years cannot make two leaſes for that term; for he has ſatisfied his licence by one leaſe.

Ibid. If a copyholder makes a leaſe by licence, the leſſee may aſſign without licence, or make an under-leaſe; for the lord by his licence has parted with his intereſt.

Ibid. So, if the leſſor, after a leaſe by licence, dies without heir, the leſſee ſhall have it for his term againſt the lord; for the licence is a confirmation of the lord.

Cro. Eliz. 160. So, a leaſe for years by parol, made by the remainder-man of a copyhold in fee, commences immediately, if the tenant for life join with him and ſurrender the eſtate to his uſe.

Ibid. If the lord licence his copyholder, to make a leaſe of lands in the tenure of *A.* though they are in the tenure of *B.* yet the licence is good.

Ibid. 535. Cro. Jac. 437. A copyholder, having a licence to leaſe, may leaſe for fewer years than his licence allows; as a leaſe for three years, under a licence to let for twenty-one, which is good.

Cro. Eliz. [462.] So, if the lord licence his copyholder for life to make a leaſe for three years, if he ſo long live, a leaſe for three years abſolutely is good: for a leaſe by a copyholder for life determines by his death, and therefore the condition annexed, being implied by law, is void.

Ibid. If the lord licence upon condition, the condition is void; for he gives nothing, but only diſpenſes with the forfeiture.

Com. Dig. *tit ante.* A licence may however be upon a condition precedent; for till the condition be performed it is no licence.

Cro. Jac. 36. If a copyholder make a leaſe for years of land whereof a feme by cuſtom is to have her widow's eſtate, ſhe ſhall not avoid the leaſe, unleſs there be a ſpecial cuſtom to avoid it; for he comes under the cuſtom, and by the lord's licence, as well as the feme.

Com. Dig. *tit ante.* So, if a copyholder, after a leaſe by licence, forfeits his copyhold, the lord ſhall not avoid the leaſe: or if he dies, as before obſerved, without any heir.

Ibid. If a copyholder, by licence makes a leaſe for years, rendering rent, he cannot afterwards ſurrender the rent without a ſurrender of the reverſion.

Cro. Eliz. 459. When the baron was ſeiſed of a manor in right of his feme,

feme, and let a copyhold parcel thereof for years by indenture and died, it was held that it ſhould not deſtroy the cuſtom to demiſe it by copy, but after the death of her baron, the feme might ſo demiſe it as before. The ſame law is, if tenant for life of a manor lets a copyhold parcel of the manor for years, and dies, it ſhall not deſtroy the cuſtom as to him in reverſion.

A leaſe without licence, and contrary to the cuſtom, in order to amount to a forfeiture muſt be a perfect leaſe, and muſt have a certain beginning and a certain end, for otherwiſe the leaſe is void, and carries but an eſtate at will at moſt, which is no forfeiture. Bac. Abr. tit. Leaſes (I. 6.)

An infant copyholder without licence of the lord, made a leaſe for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ouſted the leſſee; and in this caſe it was adjudged, that the leaſe was a good leaſe till avoided, and that a leaſe for years by a copyholder without licence is not a diſſeiſin; and admitting that it ſhould be a forfeiture in this caſe, yet if the lord enters for it, the infant may re-enter upon him, and ſo is no miſchief; and therefore he, having acccepted the rent at full age, hath made it good and unavoidable, and being at all events a good leaſe as to all ſtrangers, for that reaſon principally it was adjudged that ſuch acceptance had made it good. Bac. Abr. *ut ante.*

A leaſe by a copyholder for a year, with a covenant to renew yearly, we have before obſerved is not a forfeiture. In ſuch covenant it would perhaps be ſtill better if it were worded "to permit and ſuffer" the leſſee to have, hold, and enjoy the lands in ſuch manner; for a covenant in that form, even of freehold lands, will not amount to an immediate leaſe, becauſe the words "permit and ſuffer" prove that the eſtate is ſtill to continue in him from whom the permiſſion is to come; for if any eſtate thereby paſſed to the covenantee, he might hold and enjoy it without any permiſſion from the covenantor, and therefore in ſuch caſe the covenantee hath only the bare covenant for his ſecurity of enjoyment, without any actual eſtate made over to him. Cro. Jac. 301. Bac. Abr. *ut ante.*

Every one having a lawful intereſt in a manor, may make voluntary grants of copyholds eſcheated, or come to his Com. Dig. tit. Copyhold (C. 3.)

hands, as well as admittances, rendering the antient rents and ſervices, which bind him who has the inheritance.

Ibid. (C. 5.) A grant therefore by any ſteward having colour of title, and granting not contrary to the command of the lord, is good. So of a clerk of a ſteward, if he holds a court and makes grants; for the tenants cannot examine his authority, nor need he give them an account of it. So, of a deputy.

Ibid. (C. 31.) But if a tenant at will of a manor cannot grant a copy-holder licence to alien for years; and if tenant for life of a manor grants a licence to alien for years, it determines at his death.

SECTION XVII. *Of Leaſes by Joint-Tenants, and Tenants in common.*

Co. Lit. 181. *b.* If land be given to two men for life or years, they are joint-tenants, and the ſurvivor ſhall hold the whole for his life, or according to the number of years limited in the conveyance.

Ibid. If a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* die, *A.* ſhall have all by ſurvivorſhip; but if *A.* die, *B.* ſhall have nothing.

Bac. Abr. tit. Joint-Tenants, and Tenants in common, (I. 1.) Two joint-tenants of a rent-charge, or rent-ſervice, and one of them dies, the ſurvivor ſhall recover all the arrearages which incurred and became due in the life-time of his companion.

Ibid. (2.) Two women joint-tenants of a leaſe for years, one of them

Co. Lit. 185. *b.* taketh huſband and dieth, yet the term ſhall ſurvive; for though all chattels real are given to the huſband if he ſurvive, yet the ſurvivor between the joint-tenants is the elder title, and after the marriage the woman continued ſole poſſeſſed; for if the huſband dieth, the widow ſhall have it and not the executors of the huſband; but otherwiſe it is of perſonal goods.

If there be two joint leſſees for life, and one grants all that belongs to him to another, the grantee and the other leſſee are tenants in common as long as both leſſees are alive, and the leſſor ſhall enter into a moiety by the death of either of them.

Co. Lit. 189. *a.* The eſſential difference between joint-tenants and tenants in common is, that joint-tenants have the lands by one joint

joint title, and in one right, and tenants in common by ſeveral titles, or by one title and by ſeveral rights; this is the reaſon why joint-tenants have one joint freehold, and tenants in common have ſeveral freeholds, though this property is common to them both, viz. that their occupation is undivided, and neither of them knoweth his part in ſeveral.

Joint-tenants and tenants in common may, according to the intereſts they have, join or ſever in making leaſes, and ſuch leaſes ſhall bind whether made to commence *in præſenti* or *futuro*. Bac. Abr. tit. Joint-Tenants and Tenants in common (H. 1.)

But if there be two joint-tenants, and they make a leaſe, by parol or deed-poll, reſerving rent to one only, it ſhall enure to both; yet if the leaſe had been by deed indented, the reſervation ſhould have been good to him only to whom it was made, and the other ſhould have taken nothing.—The reaſon of the difference is this; where the leaſe is by deed-poll or parol, the rent will follow the reverſion, which is jointly in both leſſors, and the rather, becauſe the rent being ſomething in retribution for the land given, the joint-tenant to whom it is reſerved ought to be ſeiſed of it in the ſame manner as he was of the land demiſed, which was equally for the benefit of his companion and himſelf; but where the leaſe is by deed indented, they are eſtopped to claim the rent in any other manner than is reſerved by the deed, becauſe the indenture is the deed of each party, and no man ſhall be allowed to recede from or vary his own ſolemn act. *Ibid.* Cro. Jac. 91.

If one joint-tenant does a thing which gives to another an eſtate, or right in the land, it binds the ſurvivor; as if a joint-tenant in fee or for life makes a leaſe for forty years. Com. Dig. tit. Eſtates (K. 7.)

Therefore, if two joint-tenants are in fee, and one lets his moiety for years, to begin after his death, this is good, and ſhall bind the other if he ſurvive, becauſe this is a preſent diſpoſition, and binds the land from the time of the leaſe made, ſo that he cannot after avoid it.—But a deviſe for years in ſuch manner by one joint-tenant would not bind the ſurviving, becauſe that is no preſent diſpoſition, nor binding upon the deviſor himſelf, inaſmuch as he may Bac. Abr. tit. Leaſes (I. 5)

revoke or cancel his will, and ſo deſtroy that deviſe; and therefore ſuch deviſe not taking effect to any purpoſe till his death, comes too late to prevent the ſurvivorſhip, which being the elder title, ſhall be preferred, and ſhut out the deviſe. So all grants or charges by one joint-tenant out of the land, fall off with his life, and cannot affect the ſurvivor, becauſe they being no immediate diſpoſition of the land itſelf, that comes whole and entire to the ſurvivor under the firſt title, and by conſequence over-reaches all intermediate charges or grants thereout by the other joint-tenant who is dead.

Bac. Abr. *ut ante.* But if one joint-tenant grant the veſture or herbage of the land for years, and dies, this ſhall bind the ſurvivor; ſo if two joint-tenants are of a water, and one grants a ſeparate piſcary for years and dies, this ſhall bind the ſurvivor; becauſe in theſe caſes the grant of the one joint-tenant gives an immediate intereſt in the thing itſelf whereof they are joint-tenants.

Ibid. Cro. Jac. 91. If two joint-tenants for life are, and one of them makes a leaſe for years of his moiety, either to begin preſently or after his death, and dies, this leaſe is good, and binding againſt the ſurvivor; the reaſon whereof is, that notwithſtanding the leaſe for years, the joint-tenancy in the freehold ſtill continues, and in that they have a mutual intereſt in each other's life, ſo that the eſtate in the whole or any part is not to determine or revert to the leſſor till both are dead, for the life of one as well as the other was at firſt made the meaſure of the eſtate granted out by the leſſor, and therefore ſo long as either of them lives, if the joint-tenancy continues, he is not to come into poſſeſſion.—Now theſe joint-tenants having a reciprocal intereſt in each other's life, when one of them makes a leaſe for years of his moiety, this does not depend for its continuance on his life only, but on his life and the life of the other joint-tenant, whichſoever of them ſhall live longeſt, according to the nature and continuance of the eſtate whereout it was derived; and then, ſo long as that continues, ſo long the leaſe holds good, and by conſequence ſuch leſſee ſhall hold out the ſurviving joint-tenant and the reverſioner, till the eſtate, whereout this leaſe was derived, be fully determined.

But

But if a rent were reſerved on ſuch leaſe, this is determined and gone by the death of the leſſor: for the ſurvivor cannot have it, becauſe he comes in by title paramount the leaſe, and the heirs of the leſſor have no title to it, becauſe they have no reverſion or intereſt in the land; but *quære* if the executors or adminiſtrators cannot maintain an action of debt or covenant, either upon the covenant in law, or expreſs covenant, for the payment of the money if there be any? Bac. Abr. ut ante.

This remedy is now given to the repreſentatives of ſuch a leſſor; for by ſtatute 11 *G.* 2. *c.* 19. *s.* 15. the executors or adminiſtrators of tenant for life ſhall, on his death, recover of the leſſee a rateable proportion of the rent from the laſt day of payment to the death of ſuch leſſor.

A. and *B.* being joint-tenants for life, a leaſe made by *A.* of the moiety to have and hold after the death of *B.* for ſixty years, if *A.* ſo long live, and of the other moiety to have and hold after the death of *A.* for ſixty years, if *B.* ſo long live, and *A.* dies, *B.* ſurviving, is bad for both moieties: for, by the firſt words it was a good leaſe from *A.* of his part, upon the contingency of his ſurviving *B.* but that never happened, and as to *B.*'s part, *A.* had no power to leaſe or contract for it during the life of *B.* though he had happened after to ſurvive him, for it was but a bare poſſibility, which could not be leaſed or contracted for, and therefore the leaſe was void in the whole. Cro. Jac. 92, 377.

So, if one joint-tenant make a leaſe for years, "if he "and his companion live ſo long," and afterwards ſurrender his moiety, and take back another eſtate, the leaſe determines by the death of either of them: for it hath no continuance longer than the jointure continues, which is ſevered by the ſurrender, a new eſtate being taken. *Ibid.* 377.

Tenants in common cannot make a joint leaſe. But if two tenants in common of lands join in a leaſe for years, by indenture, of their ſeveral lands, this ſhall be the leaſe of each for their reſpective parts, and the croſs confirmation of each for the part of the other, and no eſtoppel on either part, becauſe an actual intereſt paſſes from each reſpectively, and that excludes the neceſſity of an eſtoppel, which is never admitted, if by any conſtruction it can be avoided, as being Com Dig. tit. Eſtates (K. 8.) Bac. Abr. tit. Joint-Tenants, and Tenants in common, (H. 1.)

being one of thoſe things which the law looks upon as odious, becauſe it chokes and diſguiſes the truth.

Ibid. tit. Leaſes (I. 5.) If one joint-tenant or tenant in common makes a leaſe for years of his part to his companion, this is good; for this only gives him a right of taking the whole profits, when before he had but a right to the moiety thereof; and he may contract with his companion for that purpoſe, as well as he may with a ſtranger.

Com. Dig. tit. Eſtates (G. 6.) If joint-tenants join in a leaſe, this ſhall be but one leaſe, for they have but one freehold; but if tenants in common join in a leaſe, it ſhall be ſeveral leaſes of their ſeveral intereſts.

SECTION XVIII. *Of Leaſes by Parceners.*

Com. Dig. tit. Parceners (A. 1.) (A. 3.) Parceners, (as they are called, by abbreviating the term co-parceners) are, where tenant in fee, or tail dies, leaving ſeveral daughters and no ſons; or ſeveral ſiſters and no iſſue, or brothers; or ſeveral aunts, *&c.* the lands deſcend among all the daughters, ſiſters, aunts, *&c.* who make but one heir.—Therefore, if *B.* leaſes, rendering 2*s.* rent, and if he dies, his heir being within full age, then 20*s.* if *B.* die leaving two daughters, the one within age, the other of full age, the 20*s.* rent is not due; for his heir was not within age, both the daughters being but one heir, and one being of full age.

Bull. N. P. 107. 2 Blom. Com. 182. Parceners ſtand upon the ſame foundation as joint-tenants, who are ſeiſed *per my et per tout*, that is by the half or moiety, and by all, each of them having the entire poſſeſſion as well of every part, as of the whole, and therefore, each may be ſaid to demiſe the whole: and ſuch is the caſe with reſpect to parceners, who, though they have an unity, have not an entirety of intereſt, but are properly entitled each to the whole of a diſtinct moiety, wherefore there is no ſurvivorſhip among them; for like joint-tenants, they have the ſame unities of intereſt, title, and poſſeſſion; and may ſue and be ſued jointly for matters relating to their own lands.

Ibid. 188.

Co. Lit. 48. *n.* 5. If parceners be of two acres, and one leaſes one acre, which on writ of partition is allotted to the other, the leaſe is wholly avoided.

SECTION

SECTION XIX. *Of Leaſes by a Bailiff of a Manor.*

A bailiff of a manor cannot, by virtue of his office, make leaſes for years; for his buſineſs is only to collect rents, gather the fines, look after the forfeitures, and ſuch like: but he hath no eſtate or intereſt in the manor itſelf, and therefore cannot contract for any certain intereſt thereout. But the lord of the manor may give him a ſpecial power to make leaſes for years, as he may do to any ſtranger, and then ſuch leaſes, if they are purſuant to the power, and made in the name of the lord, will be as good as leaſes by the lord himſelf; for the bailiff, though he hath ſuch power, cannot make them in his own name. Bac. Abr. tit. Leaſes (I. 3.)

But a general bailiff of a manor may make leaſes at will, without any ſpecial authority, becauſe, being to collect and anſwer the rents of the manor to his lord, if he could not let leaſes at will, the lord might ſuſtain great prejudice by abſence, ſickneſs, or other incapacity to make leaſes when any of the former leaſes were expired; and ſuch leaſes at will are for the benefit of the lord, and can be no ways prejudicial to him, becauſe he may determine his will when he thinks fit. *Ibid.*

This however may now be queſtioned; for ſince tenancies at will are conſtrued to be tenancies from year to year, and half a year's notice to quit is required, before a tenant can be ouſted, ſuch tenancies might prove very prejudicial to the lord's intereſt. A tenant put in by a bailiff, without any ſpecial authority, would, it is conceived, like any tenant continuing when his term had expired, be deemed a tenant at ſufferance, who has but a bare poſſeſſion and no right; and as the lord might turn him out when he pleaſed, he would have the ſame exemption from being prejudiced as formerly.

But if the bailiff of a manor hath a ſpecial power to make leaſes for years, as he ought to make them in the name of his maſter, ſo they ought to be made in writing, that the authority may appear to be purſued; a parol leaſe ſuch bailiff has no power to make. Bac. Abr. *ut ante.*

SECTION

SECTION XX. *Of Leaſes purſuant to Authority.*

Bac. Abr. tit. Leaſes, (I. 10) If one hath power, by virtue of a letter of attorney, to make leaſes for years generally by indenture, the attorney ought to make them in the name and ſtyle of his maſter, and not in his own name; for the letter of attorney gives him no intereſt or eſtate in the lands, but only an authority to ſupply the abſence of his maſter by ſtanding in his ſtead, which he can no otherwiſe do than by uſing his name, and making them juſt in the ſame manner and ſtyle as his maſter would do if he were preſent. If he ſhould make them in his own name, though he added alſo "by virtue of the letter "of attorney to him made for that purpoſe," yet ſuch leaſes ſeem to be void, becauſe the indenture being made in his name, muſt paſs the intereſt and leaſe from him, or it can paſs it from nobody: it cannot paſs it from the maſter immediately, becauſe he is no party, and it cannot paſs it from the attorney at all, becauſe he has nothing in the lands; and then his adding, "by virtue of the letter of attor-"ney," will not help it, becauſe that letter of attorney made over no eſtate or intereſt in the land to him, and conſequently he cannot, by virtue thereof, convey over any to another.

Ibid. Neither can ſuch intereſt paſs from the maſter immediately, or through the attorney; for then the ſame indenture muſt have this ſtrange effect at one and the ſame inſtant, firſt to draw out the intereſt from the maſter to the attorney, and from the attorney to the leſſee, which it certainly cannot do, and therefore all ſuch leaſes made in that manner, ſeem to be abſolutely void, and not good, even by eſtoppel againſt the attorney, becauſe they pretend to be made not in his own name abſolutely, but in the name of another, by virtue of an authority which is not purſued.

2 Ld Ray. 1418.

Bac. on Lea. 142. This caſe therefore of making leaſes by a letter of attorney, ſeems to differ from that of a ſurrender of a copyhold, or of livery of ſeiſin of a freehold by letter of attorney; for in thoſe caſes when they ſay, "we *A.* and *B.* as "attornies of *C.*" or "by virtue of a letter of attorney "from *C.* of ſuch a date, *&c.*" "do ſurrender, *&c.*" or "deliver to you ſeiſin of ſuch lands," theſe are good in this

this manner, becauſe they are only miniſterial ceremonies, or tranſitory acts *in pais*, the one to be done by holding the court rod, and the other by delivering a turf or twig; and when they do them as attornies, or by virtue of a letter of attorney from their maſter, the law pronounces thereupon as if they were actually done by the maſter himſelf, and carries the poſſeſſion accordingly.

But in a leaſe for years it is quite otherwiſe, for the indenture or deed alone convey the intereſt, and are the very eſſence of the leaſe, both as to the paſſing it out of the leſſor at firſt, and its ſubſiſtence in the leſſee afterwards. The very indenture or deed itſelf is the conveyance, without any ſubſequent conſtruction or operation of law thereupon; and therefore it muſt be made in the name and ſtyle of him who has ſuch intereſt to convey, and not in the name of the attorney, who has nothing therein; but in the concluſion of ſuch leaſe it is proper to ſay, "in witneſs "whereof *A. B.* of ſuch a place, *&c.* in purſuance of a "letter of attorney hereunto annexed, bearing date ſuch a "day;" or if the letter of attorney be general, and concern more lands than thoſe compriſed in the preſent leaſe, then to ſay, "in purſuance of a letter of attorney, bearing date "ſuch a day, *&c.* a true copy whereof is hereunto an-"nexed, hath put the hand and ſeal of the maſter," and ſo to write the maſter's name, and deliver it as the act and deed of the maſter; in which laſt ceremony of delivering it in the name of the maſter of ſuch attorney, this exactly agrees with the ceremony of ſurrendering by the rod, or making livery by a turf or twig, by the attorney in the name and as attorney of his maſter; which proves that there is a great diverſity between uſing the name of the attorney in the making of leaſes, and uſing his name in making a ſurrender of copyhold or livery of ſeiſin of a freehold eſtate.

A deviſe to a perſon as guardian, that he may "receive "ſet and let" for his ward, gives him an authority only and not an intereſt. 2 Cro. Eliz. 678.

A ſpecial agent under a limited authority cannot bind his principal by any act beyond the ſcope of ſuch limited authority. 3. T. R. 575.

Bull. N. P. 177. If the defendant inſiſt that the leaſe declared on is not the plaintiff's, the plaintiff may ſhew that it was made by *A.* who had authority from him to execute it in his name, and the authority need not be produced. But the leaſe muſt be made and executed in the name of the principal.

1 Eſp. R. 90. But in a recent caſe it was held, that where a party executes a deed under a power of attorney, the power ought to be produced.

1 Ld. Ray. 660. Where a man does ſuch an act as cannot be good by any other means but by virtue of his authority, it ſhall be intended to be an execution of his authority; but where a man has an intereſt and authority, and does an act without reciting his authority, it ſhall be intended to be done by virtue of his intereſt.

CHAPTER

CHAPTER IV.

To whom Leaſes may be made.

EVERY perſon is capable of being a leſſee, unleſs he or ſhe be rendered incompetent by ſome legal diſability; as infancy, coverture, inſanity, &c. *Infants.* Cro. Jac. 320. Bull. N. P. 177.

The leaſe as to an infant, however, is not void, but voidable at his election; therefore, if he attain his majority before the rent-day come, and have not waived the land, he will be bound by the leaſe.——Where the leaſe is not by deed, he will perhaps be liable at all events for uſe and occupation of the premiſſes in which he reſides; for he is liable for neceſſaries, under which deſcription lodging muſt ſurely come.

A feme-covert cannot be a leſſee, for her free agency is ſo ſuſpended during coverture, that ſhe may plead *non eſt factum* to an action on any covenant in the leaſe, for evidence that ſhe was covert at the time of executing the leaſe, will prove it to be not her deed. For uſe and occupation of premiſſes, her baron will be liable. *Femes-Covert.* *Ibid.* 172.

With reſpect to aliens, the ſtatute of 32 *H.* 8. *c.* 16. *s.* 13. makes all leaſes of any dwelling-houſe, or ſhop, within this realm or any of the king's dominions, made to any ſtranger, artificer, or handicraftſman born out of the king's obeiſance, not being a denizen, void and of none effect. This ſtatute may be pleaded in bar to an action of debt for rent, brought againſt an executor or adminiſtrator; but in pleading it, it ſeems neceſſary to aver that the meſſuage demiſed was a dwelling houſe or ſhop. A place need not be alledged where he was an alien and an artificer. *Aliens.* 1 Saund. R. 56. *Ibid.* 8. *n.* 2.

The above-mentioned ſtatute is ſtill in force; but though it makes *leaſes* of dwelling-houſes or ſhops granted to any ſtranger artificer void, yet if ſuch artificer occupy a dwelling-houſe or ſhop under *an agreement* which does not amount to a leaſe, as if he be tenant from year to year, or for a ſhorter time, *Ibid. n.* 1.

time, an action for uſe and occupation will lie againſt him, notwithſtanding the ſtatute.

An alien therefore is incapable of being party to a leaſe; for being born in a foreign country out of allegiance to the king, the policy of the laws has placed every obſtacle in his way to prevent him from acquiring poſſeſſions and the influence that accompanies them, in a country that does not claim his allegiance, and with the intereſts of which he is unconnected. The exceptions to this wiſe principle of excluſion are created only by the conſequences of commerce: for the convenience of trade, therefore, an alien friend is now permitted to acquire a property in goods, money, and other perſonal (not real) eſtate, and may hire a houſe for his habitation; for as the country becomes more commercial, the principles of traffic more extenſively prevail, and the laws with reſpect to foreigners become leſs rigid.—The general naturalization act for all foreign proteſtants, however, which was carried into execution by ſtat. 7 *Ann. c.* 5. it was found neceſſary to repeal, after three years experience, by ſtat. 10 *Ann. c.* 5. except the clauſe for naturalizing the children of Engliſh parents born abroad; and the impolicy and injuſtice of putting foreigners upon the ſame footing as the ſubjects of the country, are probably ſufficiently manifeſt to prevent any ſimilar experiment in future.

All children born out of the king's dominions, whoſe fathers (or grandfathers by the father's ſide) were natural born ſubjects, though their mothers were aliens, are now by various ſtatutes deemed to be natural born ſubjects themſelves to all intents and purpoſes, unleſs their ſaid anceſtors were attainted, or baniſhed beyond ſea for high treaſon; or were at the birth of ſuch children in the ſervice of a prince at enmity with Great Britain. But grandchildren of ſuch anceſtors ſhall not be privileged in reſpect of the alien's duty, except they be proteſtants, and actually reſide within the realm; nor ſhall be enabled to claim any eſtate or intereſt, unleſs the claim be made within five years after the ſame ſhall accrue.

The iſſue of an Engliſh woman by an alien, born abroad, is an alien.

The

The children of aliens born in England are, generally ſpeaking, natural born ſubjects, and entitled to all the privileges of ſuch. 1 Bl. Com. 373.

A denizen is an alien born, but who has obtained, *ex donatione regis*, letters patent to make him an *Engliſh* ſubject, an high and incommunicable branch of the royal prerogative. A denizen is a kind of middle ſtate, between an alien and a natural born ſubject, and partakes of both of them. *Denizens.* 7 Rep. 25.

He may take lands by purchaſe or deviſe, which an alien may not, but cannot take by inheritance.

A denizen therefore may be a leſſor or leſſee, for the chief incapacity which he retains regards the defect of inheritable blood; ſo that in other reſpects his ſituation may, in a great degree, be aſſimilated to that of a baſtard. He cannot however take any grant of lands, *&c.* from the crown; nor ſit in a council, or in either houſe of parliament. St. 12 W. 3. c. 2.

Naturalization cannot be performed but by act of parliament; for by this an alien is put in the ſame ſtate as if he had been born in the king's ligeance; except only that by the ſtat. 12 *W.* 3. he is incapable, as well as a denizen, of being a member of the privy council, or of either houſe of parliament, holding offices, taking grants of the crown, *&c.*

CHAPTER V.

Of the ſubject matter of Leaſes.

SECTION I. *Of corporeal Hereditaments; wherein of Farms, Lands, Houſes, and Lodgings.*

SECTION II. *Of incorporeal Hereditaments; wherein of Tithes, Tolls, Advowſons, &c.*

SECTION III. *Of Rents.*

SECTION I. *Of corporeal Hereditaments.*

Bac. Abr. tit. Leaſes (A.)

AFTER ſuch time as leaſes for years began to be looked upon as fixed and permanent intereſts, and that the leſſees were ſufficiently provided to defend themſelves and their poſſeſſions againſt the acts and incroachments, as well of the leſſor as of ſtrangers, men found it their intereſt to improve and encourage this ſort of property, and therefore extended it to all ſorts of intereſts and poſſeſſions whatſoever, being led thereto by that known rule, that *whatſoever may be granted or parted with for ever, may be granted or parted with for a time.*

Ibid. Not only lands and houſes, therefore, have been let for years, but alſo goods and chattels; though the intereſt of the leſſee therein differs from the intereſt he hath in lands or houſes ſo let for years; for if one leaſe for years a ſtock of live cattle, ſuch leaſe is good, and the leſſee hath the uſe and profits of them during the term; but yet the leſſor hath not any reverſion in them to grant over to another either during the term or after, till the leſſee hath re-delivered them to him, as he would have of lands in caſe of ſuch leaſe for years; for the leſſor hath only a poſſibility of property in caſe they all outlive the term; for if any of them die during the term, the leſſor cannot have them again after the term, and during the term he hath nothing to do with them,

them, and conſequently of ſuch as die, the property reſts abſolutely in the leſſee.

So, whether they live or die, yet all the young ones coming of them, as lambs, calves, *&c.* belong abſolutely to the leſſee as profits ariſing and ſevered from the principal, ſince otherwiſe the leſſee would pay his rent for nothing; and therefore this differs from a leaſe of other dead goods and chattels, for there, if any thing be added for the repairing, mending, or improving thereof, the leſſor ſhall have the improvements and additions together with the principal, after the leaſe ended, becauſe they cannot be ſevered without deſtroying or ſpoiling the principal: neither is the ſucceſſion of young ones, in caſe any of the old ones die, to be reſembled to a corporation aggregate, whereof when any die, thoſe that ſucceed ſhall be ſaid to be part of the ſame corporation, for the corporation in its public capacity never dies; but this being a leaſe of ſuch and ſuch individual cattle, when any of them die, the poſſibility of reverting property, which was left in the leſſor, is determined and at an end. But the leſſee, in ſuch caſe, cannot kill, deſtroy, ſell, or give them away, during the term, without being ſubject to an action of treſpaſs, as it ſhould ſeem. *Ibid.*

Corporeal hereditaments conſiſt wholly of ſubſtantial and permanent objects; all which may be comprehended under the general denomination of land only; for *land* comprehends, in its legal ſignification, any ground, ſoil, or earth whatſoever: ſo the word "land" includes, not only the face of the earth, but every thing under it, or over it; and therefore, if a man grant all his lands, he grants thereby all his mines of metal and other foſſils, his woods, his waters, and his houſes, as well as his fields and meadows. Not but that the particular names of the things are equally ſufficient to paſs them, except in the inſtance of water; by a grant of which, nothing paſſes but a right of fiſhing, and to recover the land at the bottom of which, it muſt be called ſo many "acres of land covered with water;" but the capital diſtinction is this; that by the name of a caſtle, meſſuage, toft, croft, or the like, nothing elſe will paſs, except what falls with the utmoſt propriety under the term made uſe of, (though indeed, by the name of a caſtle, one or more manors 2 Bl. Com. 18.

may be conveyed; and *è converſo*, by the name of a manor, a caſtle may paſs;) but by the name of land, which is *nomen generaliſſimum*, every thing terreſtrial will paſs.

Shep. Touch. 268. Leaſes for life, or years, or at will (now conſtrued to be from year to year), may be made of any thing corporeal or incorporeal that lieth in livery or grant.

Ibid. 93. A man therefore may demiſe his farm, which may comprehend a meſſuage and much land, meadow, paſture, wood, *&c.* thereunto belonging, or therewith uſed; for this word doth properly ſignify a capital or principal meſſuage, and a great quantity of demeſnes thereunto appertaining.

Ibid. 12. So, by the name of a meſſuage, he may paſs a houſe, a curtelage, a garden, an orchard, a dove-houſe, a ſhop, or a mill, as parcel of the ſame: the like of a cottage, a toft, a chamber, a cellar, *&c.* Yet theſe may paſs by their own ſingle names alſo, as "of one meſſuage, one curtelage, "*&c.*"

Cro. Jac. 643. If *A.* lets a garden ground for years, and the leſſee demiſes part of the term to an under-tenant, who builds on it, by a grant of the garden ground the buildings thereon will paſs.

Bac. Abr. tit. Leaſes (A.) So, a houſe; and in caſe of a leaſe of a houſe, together with goods, it is uſual to make a ſchedule thereof, and affix it to the leaſe, and to have a covenant from the leſſee to re-deliver them at the end of the term; for without ſuch covenant the leſſor could have no other remedy, but trover, or detinue for them after the leaſe ended.

Cro. Car. 57. Cro. Jac. 526. The demiſe of a houſe "with the appurtenances," will, it ſeems, paſs the houſe, with the orchards, yards, and curtelage, and garden; but not the land; eſpecially if it be at

Ibid. 281. a diſtance, though occupied with the houſe; but if the leſſor had built a conduit, though in another part of the land, yet the conduit would paſs with the houſe, becauſe it is neceſſary, *et quaſi*, appendant thereto: yet if the leſſee erect ſuch a conduit, and afterwards the leſſor, during the leaſe, ſell the houſe to one, and the land wherein the conduit is to another, and afterwards the leaſe determines, he who has the land wherein the conduit is may diſturb the other in the uſing thereof, and may break it, becauſe it was not erected by one who had a permanent eſtate or inheritance, nor made one,

one, by the occupation and uſage of them together, by him who had the inheritance.—So, the demiſe of a houſe, "and "the appurtenances," will not paſs an adjoining building not accounted parcel of the houſe, although held with it for thirty years. But in one caſe, it was held that a grant from the crown, of a houſe *cum pertinentiis* would paſs land that was occupied with the houſe: in this caſe however it ſhould not be overlooked, that the point aroſe on a ſpecial verdict, in which the houſe and land were found to be all one. Cro. Car. 17. *Ibid.* 169.

Whether the thing claimed as appurtenant be accounted parcel or not, and the intention of the parties, are the rules by which to judge in theſe caſes. *Ibid.* 17.

The demiſe of premiſſes in *Weſtminſter* late in the occupation of *A.* (particularly deſcribing them,) part of which was a yard, does not paſs a cellar ſituate under that yard, which was then occupied by *B.* another tenant of the leſſor. 1 T. R. 701.

The reſpective apartments of a houſe may be, and frequently are, let to ſeveral and diſtinct individuals; which tenancies are termed lodgings, and the tenants thereof lodgers: reſpecting which ſee more at large hereafter.

SECTION II. *Of incorporeal Hereditaments.*

An incorporeal hereditament is a right iſſuing out of a thing corporate, (whether real or perſonal) or concerning, or annexed to, or exerciſeable within the ſame; and incorporeal hereditaments are principally theſe, *viz.* advowſons, tithes, tolls, eſtovers, commons, ways, offices, franchiſes, corrodies or penſions, annuities, and rents. Co. Lit. 19, 20.

An advowſon is the right of preſentation to a church or benefice, and is either appendant to a manor, lands, *&c.* or in groſs, that is, ſubſiſting by itſelf, belonging to a perſon, not to a manor, lands, *&c.* It is a valuable right and properly the object of ſale; it is therefore real aſſets in the hands of the heir: but as the exerciſe of this right is a public truſt, it cannot, it ought not, to produce any profit.—Therefore, though an advowſon may be granted, either by a grant by deed or will, of the manor, *&c.* to which it is appendant, without any exception of the advowſon, in which caſe it will paſs, (for it is parcel of the manor, except in the caſe of the king) or by grant of the advowſon alone, and ſuch *Advowſons.* *Ibid.* 121, 122. 2 Bl. R. 1053.

grant may be either in fee, or for the right of one or more turns, or for as many as ſhall happen within a time limited, yet it cannot properly be the ſubject of a demiſe, for as no profit is permitted to accrue, no rent can be reſerved, nor any ſervices performed to the proprietor. *Sed vide poſt.* p. 122.

Tithes.

Tithes have been defined to be, a tenth part of the increaſe, yearly ariſing and renewing from the profits of lands, the ſtock upon lands, and the perſonal induſtry of the inhabitants; and are an eccleſiaſtical inheritance, collateral to the land, and properly due to an eccleſiaſtical perſon.

Shep. Touch. 241.

A parſon of a church may grant his tithes for years, and yet they are not in him.

By the ſtatute 5 *G.* 3. *c.* 17. entitled "An act to confirm "all leaſes already made by archbiſhops and biſhops, and "other eccleſiaſtical perſons, of tithes and other incorpo- "real hereditaments, for one, two, or three life or lives, or "twenty-one years; and to enable them to grant ſuch leaſes, "and to bring actions of debt for the recovery of rents re- "ſerved and in arrear on leaſes for life or lives," any other perſon or perſons, having any ſpiritual or eccleſiaſtical promotions, are enabled to grant ſuch leaſes of tithes, tolls, or other incorporeal inheritances, "which ſhall be as good and "effectual in law againſt ſuch archbiſhop, biſhop, maſters "and fellows, or other heads and members of colleges or "halls, deans and chapters, precentors, prebendaries, maſ- "ters and guardians of hoſpitals, and other perſons ſo "granting the ſame, and their ſucceſſors, and every of them, "to all intents and purpoſes, as any leaſe or leaſes already "made, or to be made by any ſuch archbiſhop, *&c.*" by virtue of the ſtat. 32 *H.* 8. *c.* 28. or any other ſtatute then in being; and action of debt may be brought by ſuch leſſors for rent in arrear, as in the caſe of any other landlord or leſſor.

Tolls.

2 T. R. 169.

Tolls alſo, may be lett or mortgaged.

Eſtovers. Shep. Touch. 222.

So, eſtovers (of which more hereafter) may be leaſed; the grantee, therefore, of houſe-bote, or hay-bote, may let it to another.

Bac. Abr. tit. Leaſes (A)

Commons,

With reſpect to commons, the ſtat. 13 *G.* 3. *c.* 81. *s.* 15. empowers the lord of any manor with the conſent of three-fourths of the perſons having right of common upon the waſtes and commons within the manor, at any time to demiſe

demiſe or leaſe, for any term or number of years, not exceeding four years, any part of ſuch waſtes and commons, not exceeding a twelfth part thereof, for the beſt and moſt improved yearly rent that can by publick auction be got for the ſame; and directs that the clear net-rents ſhall be applied to drain, fence, and otherwiſe improve the reſidue of the waſtes and commons.

Ways.

Ways, or a right of way, is demiſeable with the land; for the grantee or leſſee ſhall have all the ways, eaſements, *&c.* which the grantor or leſſor had. 6 Mod. 3, 149.

If a man, upon a leaſe for years, reſerve a way to himſelf through the houſe of the leſſee to a back-houſe, he cannot uſe it but at ſeaſonable times and upon requeſt. 1 Vent. 48.

Though by the leaſe of the land, a way well paſſeth without being expreſſed in the deed, there is a difference between that caſe and a grant of land with common, or eſtovers to be burned there; for if one let the land, the common or eſtovers will not paſs without a deed and expreſs words therein, becauſe they are profits *à prendre* in another's ſoil, and are not of neceſſity, as a way is, for land cannot be uſed without a way. Cro. Jac. 170, 190.

Offices.

An office may be granted by way of leaſe, provided no inconvenience or injury to the public is likely to enſue; and it may be granted in fee-tail, for life, or years, or at will. Com. Dig. tit. Officer (B. 7, &c.)

But an office to which a truſt is annexed, or which concerns the adminiſtration of juſtice, cannot be granted for years, for then it would go to the executor, or adminiſtrator, or ordinary, and might be ſeiſed upon outlawry, *&c.* *Ibid.*

Therefore the office of marſhal of the King's Bench cannot be granted for years, becauſe it is an office of truſt and daily attendance; and ſuch a termor for years may die inteſtate, and then it would be in ſuſpence until adminiſtration is committed, which is the act of another court. 3 Mod. 145.

It hath however been held, that a leaſe thereof for years during the life of the grantee is good; for hereby the danger of the office going to executors is avoided. It appears alſo, that the dean and chapter of *Weſtminſter* made a leaſe for years of the Gate-houſe priſon [ſince pulled down] and the leſſee had committed ſeveral offences which amounted to a forfeiture, for which the office was ſeiſed; but no objec- 6 Mod. 57. Bac. Abr. tit. Leaſes (A.)

tion was made to its being let for years.—There ſeems to be a difference, however, between the two caſes; the firſt, namely that of the marſhal of the King's Bench, (ſince regulated by ſtatute 13 *G.* 2. *c.* 17.) was a grant from the crown, in whom all offices, in relation to the adminiſtration of juſtice, are originally and inherently lodged, and therefore for the crown to grant out ſuch office for years may be liable to the objections before mentioned; but in the latter caſe, namely that of the gate-houſe priſon, the dean and chapter are the immediate grantees of the crown, and they have the office to them and their ſucceſſors for ever in fee, and are perpetual gaolers themſelves, and anſwerable to the crown, notwithſtanding any leaſe over to another; and therefore they always take ſecurity of ſuch under-leſſee for their own indemnity.

Ibid. Buying or ſelling offices that touch the adminiſtration of juſtice or the revenue is prohibited by ſtat. 5 & 6 *E.* 6. *c.* 16.

Such offices as do not concern the adminiſtration of juſtice, but only require ſkill and diligence, may be granted for years, becauſe they may be executed by deputies, without any inconvenience to the public.

Where one made a grant for years of the ſtewardſhip of a court-leet and court-baron, it was held void as to the court-leet, being a judicial office, but good as to the court-baron, being only miniſterial and the ſuitors judges thereof; but the grant appearing afterwards to be for years determinable upon the death of the leſſee, it was held good for both, becauſe there was no danger of its coming to executors or adminiſtrators.

Cro. Car. 279. An office, that may be granted at all, may generally be granted alſo in reverſion; but it cannot be granted as a reverſion and by the name of a reverſion, for there is no reverſion of an office, unleſs it be an office of inheritance; yet it may well be granted in reverſion, *habendum* after the death of the grantee for life. If an office be granted in reverſion, the grantee, upon the death or forfeiture of the former officer, muſt diſcharge his duty at his peril, without notice given to him of the vacancy.

Com. Dig. tit. Officer (B. 14)

Ibid. (B. 11) If an office be granted *durante bene placito*, it ſhall not be determined at the will of the party, but only at the will of

of the king; and therefore the party may ſurrender, and if forfeited, it ſhall be found by inquiſition, and till a ſurrender, or forfeiture, he continues officer.

An office in fee, granted by a ſubject generally, may be aſſigned: though it be an office of truſt; for "heir" includes aſſigns; ſo, an office granted to one and his aſſigns, may be aſſigned. *Ibid.* (C.)

But an office of truſt cannot be aſſigned, without the aſſent of him who granted the office. *Ibid.*

A covenant may be to ſtand ſeiſed of an office to the uſe of another. *Ibid.*

An office cannot be demiſed by parol. 2 Ld. Raym. 853.

Dignities and honours cannot be granted for years. Bac. Abr. tit. Leaſes (A.)

Franchiſes may be demiſed, except indeed in ſome few particular caſes, as where the franchiſe is a perſonal immunity, &c. Thus a fair or market, either with or without the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, may be demiſed. Every fair is a market, but not *è contra*. *Franchiſes.* 2 Inſt. 406, 221.

Touching corrodies and penſions, a corrody is a right of ſuſtenance, or to receive certain allotments of food for one's maintenance: in lieu of which, eſpecially when due from eccleſiaſtical perſons, a penſion or ſum of money is ſometimes ſubſtituted; and theſe are chargeable on the perſon of the owner of the inheritance in reſpect thereof. It is ſaid, that a corody may be due to a common perſon by grant from one to another. A corody is either certain or uncertain, and may be not only for life or years, but in fee. If one hath a corody for life, he may let it to another, or to the grantor himſelf. *Corrodies and Penſions.* 2 Bl. Com. 41. New Terms of Law. Bac. Abr. tit. Leaſes (A.)

An annuity is an annual ſum of money granted to another in fee, for life, or years, which charges the perſon of the grantor only; or it may be due by preſcription, which always implies a grant. Such annuity may be demiſed by way of aſſignment. *Annuities,* Co Lit. 144. *b*, Com. Dig. tit. Annuity (A 1.) *Ibid.* (E)

Rents form the laſt kind of incorporeal hereditaments, and may be the ſubject of a leaſe. As it is of importance in a work like this, that the nature of rent ſhould be underſtood by the reader, we ſhall here ſtate more particularly the different ſorts; though as to the remedies for the recovery *Rents.*

thereof, and other matters incidental to this ſubject, they will be found under the ſeveral heads to which they reſpectively belong.

SECTION III. *Of Rents.*

2 Bl. Com. 41. The word *rent*, or render, *reditus*, ſignifies a compenſation or return, it being in the nature of an acknowledgment given for the poſſeſſion of ſome corporeal inheritance. It is defined to be a certain profit iſſuing yearly out of lands and tenements corporeal. It muſt be a *profit:* yet there is no occaſion for it to be, as it uſually is, a ſum of money; for ſpurs, capons, horſes, corn, and other matters may be rendered, and frequently are rendered by way of rent. It may alſo conſiſt in ſervices and manual operations; as, to plough ſo many acres of ground, to attend the king, or the lord to the wars, and the like; which ſervices, in the eye of the law, are profits. This profit muſt alſo be *certain*; or that which may be reduced to a certainty by either party: it muſt alſo iſſue *yearly*; though there is no occaſion for it to iſſue every ſucceſſive year; but it may be reſerved every ſecond, third, or fourth year; yet, as it is to be produced out of the profits of lands and tenements as a recompence for being permitted to hold and enjoy them, it ought to be reſerved yearly, becauſe thoſe profits annually ariſe and are annually renewed. It muſt *iſſue out* of the thing granted, and not be part of the land or thing itſelf; wherein it differs from an exception in the grant, which is always of part of the thing granted. But it muſt neceſſarily iſſue out of *lands and tenements corporeal* merely; that is, from ſome inheritance whereunto the owner or grantee of the rent may
2 Woodd. 69. have recourſe to diſtrain; for there is no doubt but the leſſee of tithes, an avowſon, or any incorporeal hereditament, would be liable to an action of debt for the rent agreed upon.

2 Bl. Com. 41. There are at common law three manner of rents: rent-ſervice, rent-charge, and rent-ſeck. Rent-ſervice is ſo called becauſe it hath ſome corporal ſervice incident to it, as at the leaſt fealty: for, if a tenant hold his land by fealty, and ten ſhillings rent, or by ſervice of ploughing the lord's land and five ſhillings rent, theſe pecuniary rents being

being connected with perſonal ſervices, are therefore called rent-ſervice; and for theſe, in caſe they be behind or in arrear at the day appointed, the lord may diſtrain of common right, without reſerving any ſpecial power of diſtreſs; provided he hath in himſelf the reverſion, or future eſtate of the lands and tenements, after the leaſe or particular eſtate of the leſſee or grantee is expired. A rent-charge is where the owner of the rent hath no future intereſt, or reverſion expectant in the land: as where a man by deed maketh over to others his whole eſtate in fee-ſimple, with a certain rent payable thereout, and adds to the deed a covenant or clauſe of diſtreſs, that if the rent be in arrear, or behind, it ſhall be lawful to diſtrain for the ſame: in this caſe the land is liable to the diſtreſs, not of common right, but by virtue of the clauſe in the deed; and therefore it is called a rent-charge, becauſe in this manner the land is charged with a diſtreſs for the payment of it.—A clear rent-charge muſt be free from the land-tax. Doug. 618.

If a rent-charge be granted in fee with a clauſe of diſtreſs, and a fine be levied of the lands, to the uſe and intent that if the ſaid *yearly rent* ſhould be behind and no ſufficient diſtreſs, the grantee, his heirs or aſſigns, may enter till the rent be paid; on *half a year's rent* becoming arrear, the grantee may enter: for this is not a condition, but a limitation to the uſe, and ſhall be conſtrued according to the intent of the parties; and the yearly rent was arrear, when any of the half year was arrear. Cro. Jac. 510.

If a rent-charge be granted out of a leaſe for years, it hath been adjudged that the grantee may bring annuity when the leaſe is ended. Moor. c. 450.

Rent-ſeck or barren rent, *idem eſt quod reditus ſiccus*, is in effect nothing more than a rent reſerved by deed, but without any clauſe of diſtreſs. Bl. Com. 42.

There are alſo other ſpecies of rents, which are reducible to the following three. Rents of aſſize, which are the certain eſtabliſhed rents of the freeholders and antient copyholders of a manor, and which cannot be departed from: thoſe of the freeholders are frequently called chief-rents, *reditus capitales*; and both ſorts are indifferently denominated quit-rents, *quieti reditus*; becauſe thereby the tenant goes

Co. Litt. 144. Harg. n. 5.

goes quit and free of all other ſervices. Rack-rent is only a rent of the full value of the tenement or near it. A fee-farm-rent is a rent-charge or rent-ſervice, which is reſerved on a grant in fee; the name is founded on the perpetuity of the rent or ſervice, not on the *quantum*.

This point however is queſtioned, though as Mr. *Hargrave*'s ſeems to us to be the better opinion, we have adopted it. *Vide Doug.* 605.

2 Bl. Com. 43.

A grant of lands therefore reſerving ſo conſiderable a rent, was indeed only letting lands to farm in fee-ſimple inſtead of the uſual terms for life or years. Since the ſtatute of *quia emptores*, *Weſtm.* 18 *Ed.* 1. *ſt.* 1. it ſeems ſuch grants by any ſubject cannot be made, becauſe the grantor parting with the fee is by operation of that ſtatute without any reverſion, and without a reverſion there cannot be a rent-ſervice.

Hargrave's n. *ſupra.*

6 T. R. 338.

If the reſervation be of corn, as in the caſe of an hoſpital renewed leaſe, where the *reddendum* was "ſo many quarters of corn," it will be underſtood to mean legal quarters, reckoning the buſhel at eight gallons; although the old leaſes before the ſtatute 22 and 23 *Car.* 2. *c.* 12. contained the ſame *reddendum*, and although till lately the leſſees paid by compoſition, reckoning the buſhel at nine gallons.

Bl. Com. 43.

Theſe are the general diviſions of rent; and the difference between them (in reſpect of the remedy for recovering them) is not totally aboliſhed by ſtat. 4 *G.* 2. *c.* 28.; as all perſons may have the like remedy by diſtreſs for rents-ſeck, rents of aſſiſe, and chief-rents, that is for ſuch as had been paid for three years, within twenty years before the paſſing that act, or for ſuch as have been ſince created, as in caſe of rents reſerved upon leaſe.

Stat. 32 H. 8. c. 37.

By ſtatute 32 *H.* 8. *c.* 37. *s.* 1. the executors or adminiſtrators of tenants in fee-ſimple, tenants in fee-tail, and tenants for term of life, of rents-ſervice, rent-charges, rents-ſeck, and fee-farms, unto whom any ſuch rent or fee-farm be due, ſhall have an action of debt for ſuch arrears againſt the tenants, who ought to have paid in the lifetime of their teſtator, or againſt their executors and adminiſtrators, and diſtrain for the arrears on the land charged with the payment, ſo long as the lands continue in the ſeiſin or poſſeſſion

poſſeſſion of the tenant in demeſne, who ought to have paid the rent or fee-farm, or in the ſeiſin or poſſeſſion of any other perſon claiming only from the ſame tenant by purchaſe, gift, or deſcent, in like manner as their teſtator might have done.

S. 3. If any man have, in right of his wife, any eſtate in rents or fee-farms, and the ſame be unpaid in the wife's life, the huſband, after the death of his wife, his executors and adminiſtrators, ſhall have action of debt for the arrears, or may diſtrain.

S. 4. If any have any rents or fee-farms for term of life of any other perſon, and the rent, *&c.* be unpaid in the life of ſuch perſon, and after the ſaid perſon doth die, he to whom the rent or fee-farm is due, his executors and adminiſtrators, ſhall have an action of debt, or diſtrain for the ſame.

Statute 12 *C.* 2. *c.* 24. *s.* 5. provides that nothing therein contained ſhall be conſtrued to take away any rents certain, or other ſervice incident or belonging to tenure in common ſocage, or the fealty and diſtreſs incident thereunto; and that ſuch relief ſhall be paid in reſpect of ſuch rents as is paid in caſe of a death of a tenant in common ſocage. Stat. 12 C. 2. c. 24.

Occaſionally alſo, acts of parliament empower the officers of government to grant leaſes of the duties thereby impoſed; as the act 12 *C.* 2. *c.* 23. *s.* 27. reſpecting the duties of exciſe upon ale, beer, *&c.* and alſo *c.* 25. *s.* 3. of the ſame ſtatute; *&c.*

CHAPTER

CHAPTER VI.

For what Term Leaſes may be made.

SECTION I. *Of Tenants for Life, and how created.*

SECTION II. *Of Tenants for Years, abſolutely, or by way of Mortgage, wherein of the commencement, duration, and termination, of their Tenancies; and of the ſurrender and renewal of Leaſes.*

SECTION I. *Of Tenants for Life, and how created.*

Com. Dig. tit. Eſtates (E. 1.)

TENANT for term of life ſhall be when lands are demiſed to a man for his life, or for the life of another, or for the life of himſelf and ſeveral others. So, if tenant for life by curteſey or in dower, grants his or her eſtate over, the grantee ſhall be tenant *per auter vie.*

Ibid. and Co. Lit. 412. &c.

So, if lands are demiſed or granted to a man generally, and livery be made upon it, ſuch demiſe or grant to another generally, by tenant in fee, ſhall be an eſtate to the leſſee for his own life: for his life is greater in conſideration of law than another's life; and therefore if he leaſes to him in remainder or reverſion for his life, he ſhall have it after the death of the leſſee, for it was not a ſurrender: but if it be by tenant in tail, it ſhall be for the life of the leſſor; for that is all he can lawfully grant, unleſs he leaſe according to the ſtat. 32 *H.* 8. *c.* 28.

Ibid.

So, a demiſe to another for a time indeterminate, paſſes for life, if livery be made.

Ibid.

Or a demiſe of things which lie in grant, without livery; as a leaſe to a man *quamdiu ſe bene geſſerit*; to a woman *durante viduitate* or *dum ſola*; to huſband and wife during coverture; to *A.* as long as he inhabits, or pays ſuch rent, or till he be preferred to ſuch a benefice, or till out of the profits he has paid 100 *l.* or other ſum, or during his exile, if

if he be abſent from his country voluntarily, and not by edict.

So, if the king grants an office at will, and a rent for it for his life, he has an eſtate for life in the rent, though it determines with his office. *Ibid.*

But if one make a leaſe for life, and ſay that if the leſſee within one year pay not 20 *s.* he ſhall have but a term for two years by this; if he do not pay the money he has only a leaſe for two years, even though livery of ſeiſin be made upon it. Co. Lit. 218.

With reſpect to the quantity of intereſt that he poſſeſſes, tenant for life has a freehold, as well as tenant in fee or tail. Co. Lit. 43. *b.*

Livery of ſeiſin, by the common law, is neceſſary to be made upon every grant of an eſtate of freehold in hereditaments corporeal, whether of inheritance or for life only. One reaſon why freeholds cannot be made to commence *in futuro*, is becauſe they cannot, (at common law) be made but by livery of ſeiſin; which livery being an actual manual tradition of the land, [for the word "livery" is probably an abbreviation of "delivery,"] muſt take effect *in præſenti*, or not at all. 2 Bl. Com. 314.

Livery of ſeiſin is either in deed or in law.

Livery in *deed* is thus performed: the leſſor, or his attorney, together with the leſſee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themſelves in perſon,) come to the land, or to the houſe, and there, in the preſence of witneſſes, declare the contents of the leaſe on which livery is to be made. Then the leſſor, if it be of land, delivers to the leſſee, all other perſons being out of the ground, a clod, or turf, or a twig, or bough, there growing, with words to this effect, "I deliver theſe to you in the name of ſeiſin of all the "lands and tenements contained in this deed." But if it be of a houſe, the leſſor muſt take the ring, or latch of the door, the houſe being quite empty, and deliver it to the leſſee in the ſame form, as in the caſe of land; and then the leſſee muſt enter alone, and ſhut to the door, and then open it, and let in the others. If the conveyance be of divers lands, lying ſcattered in one and the ſame county, and then *Ibid.* 315.

in

in the leſſor's poſſeſſion, livery of ſeiſin of any parcel in the name of the reſidue is ſufficient for all; but if they be in ſeveral counties, there muſt be as many liveries as there are counties; for if the title to theſe lands comes to be diſputed, there muſt be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Alſo, if the lands be out on leaſe, though all lie in ſame county, there muſt be as many liveries as there are tenants; becauſe no livery can be made in this caſe, but by the conſent of the particular tenant, and the conſent of one will not bind the reſt.—In all theſe caſes, it is prudent and uſual to endorſe the livery of ſeiſin on the back of the deed, ſpecifying the manner, place, and time of making it, together with the names of the witneſſes.

Ibid. 316. Livery in *law* is where the ſame is not made on the land, but in ſight of it only; the leſſor ſaying to the leſſee, "I demiſe, grant, and to farm let, ſuch land unto you, "enter and take poſſeſſion." Here if the leſſor enters during the life of the leſſor, it is a good livery, but not otherwiſe; unleſs indeed he dare not enter through fear of his life, or bodily harm; and then his continual claim made yearly in due form of law, as near as poſſible to the lands, will ſuffice without entry; and ſuch continual claim by tenant for life is ſufficient for him in reverſion or remainder. This livery in law cannot however be given or received by attorney, but only by the parties themſelves.

Com. Dig. tit. Feoffment (B. 1.) If a man leaſes to *A.* for years, remainder to *B.* in fee, in tail, or for life, he muſt make livery to *A.*

Ibid. If a leaſe be to *A.* and *B.* livery to one of the leſſees is ſufficient,

Shep. Touch. 272 a Bl. Com. 144. 314. A leaſe for life of any thing whatſoever, whether it lie in livery or in grant, if it be *in eſſe* before, cannot begin at a day to come; for an eſtate of freehold cannot commence *in futuro.*

Shep. Touch. 272 Therefore if a leaſe be made *habendum* from *Michaelmas* next, or from the day of the making of it [this however is either incluſive or excluſive, *vide poſtea*] or after the death of the leſſor, or after the death of *J. S.* to the leſſee for life, this leaſe is not good.

Ibid. 210. So alſo where one doth make a leaſe of land to another for

for years, the remainder to a ſtranger for life, in this caſe livery of ſeiſin muſt be had and made to the leſſee for years, or elſe nothing will paſs to him in remainder, and yet the leaſe for years will be good.

But livery of ſeiſin is not needful or requiſite to be had and made in caſes where ſuch eſtate for life is made or granted of any lands by matter of record; nor where ſuch eſtate is created by way of covenant and raiſing of uſe, or of exchange, or endowment; nor where ſuch eſtate is paſſed or granted by way of ſurrender, deviſe, releaſe, or confirmation; or by way of increaſe or executory grant; as when the fee-ſimple is granted to the leſſee for life or years in poſſeſſion. *Ibid.*

Neither is it requiſite, or can be made, where any incorporeal hereditaments are granted for life. Nor is it requiſite in ſome caſes, where an eſtate of freehold is made of a corporeal thing; as if a houſe or land belong to an office, and the office be granted by deed, the houſe or land paſſes as incident thereunto. So if a houſe or chamber belong to a corrody. *Ibid.*

Neither is it needful, where one doth grant to me and my heirs all the trees growing on his ground; for theſe will paſs without livery of ſeiſin at all. *Ibid.* 211.

Though, if a man makes leaſes for three lives, there muſt be livery; yet, if tenant for life with power to make leaſes for three lives, makes a leaſe accordingly, livery is not neceſſary. 1 Ld. Raym. 166.

Livery within view, and entry afterwards, are equal to a livery on the land itſelf; and if a man cannot enter for fear of outrage, yet it is good; ſo alſo is a claim within view good, where a man fears to enter: for in both caſes a man ought to take poſſeſſion where he can, becauſe it is the change of poſſeſſion that makes the notoriety in both caſes. Gilb. L. of Ten.

Section II. *Of Tenants for Years, abſolutely, or by way of Mortgage; wherein of the commencement, duration, and termination of their Tenancies: and of the ſurrender and renewal of Leaſes.*

Tenant for term of years ſhall be, where a man lets lands, tenements, or hereditaments to another for a term of certain Com. Dig. tit. Eſtates (G. 1.)

tain years; and every eſtate which muſt expire at a period certain and prefixed, by whatever words created, is an eſtate for years.

2 Bl. Com. 143. Therefore this eſtate is frequently called a term, *terminus*, becauſe its duration or continuance is bounded, limited, and

Shep. Touch. c. 14, 267. determined. It is properly called a term of years when the leaſe is made for ten, a hundred, a thouſand years and the like, as the leſſor and leſſee agree; for the word term doth not only ſignify the limits and limitation of time, but alſo the eſtate and intereſt that doth paſs for that time.

1 Salk. 154. Such terms are frequently created for particular purpoſes, as to raiſe portions, *&c.* and when the purpoſe is anſwered, they attend the inheritance; ſo, they are created, as has

Cowp. 597. been before mentioned, by way of mortgage. Lands are often conveyed in the nature of a leaſe for long terms, as five hundred years, *&c.* in order to raiſe portions, and for other purpoſes, in family ſettlements, and ſuch are not accounted leaſes, but terms to attend the inheritance: no man has a leaſe, for example, of two thouſand years, as a leaſe, but as a term to attend the inheritance. Half the titles in the kingdom are ſo.

2 Bl. Com. 143. An eſtate for a thouſand years is only a chattel, and reckoned part of the perſonal eſtate.

Co. R. 10. p. 87. Therefore, if a leaſe be deviſed to one, and the heirs male of his body, yet his executors ſhall have it: for a term is but a chattel, which cannot be entailed, and ſuch deviſee may well alien the term to whom he pleaſes.

2 Vent. 194, 5. If, however, it be limited to attend the inheritance, it may be entailed; though the entail of the inheritance and of the term be by different clauſes, or deeds executed at different times.

Commencement of a Leaſe for Years.

With reſpect to the commencement of a leaſe for years, as it is a mere chattel, it may be made to commence either

2 Bl. Com. 144. Shep. Touch. 267. *in præſenti*, or *in futuro*; according to the agreement of the parties; and the leaſe that is to commence *in futuro*, is

Ibid. 272. called *intereſſe termini*, or future intereſt.—A leaſe for years therefore, may begin at a day to come, as at *Michaelmas* next, or for three or ten years after, or after the death of the leſſor, or of *J. S.* and is as good as where it doth begin preſently.

A leaſe

A leaſe to commence after the determination of a prior leaſe, ſhall begin preſently, if the prior leaſe was void at law; ſo a leaſe to commence *ad feſtum annunciationis*, after the determination of a former leaſe, is as good as if it hed been *a feſto, &c.* Cro. Car. 398, 502.

For a leaſe intended to commence *in futuro*, which miſrecites the prior leaſe on which it depends in a material point, ſhall begin immediately. *Ibid.* 400.

This rule, that if the former leaſe be miſrecited in the date, *&c.* and a new leaſe made, to begin after the expiration of the ſaid recited leaſe, that ſuch new leaſe ſhall begin preſently, holds as well in the leaſe itſelf, as where the jury find an indenture of leaſe, whereby it is recited, that the leſſor made ſuch former leaſe of ſuch date and under ſuch rent, without finding it in fact, but only by way of recital in the deed, ſuch ſecond leaſe ſhall in conſtruction of law be adjudged to begin preſently, though in the deed it is limited to begin after the expiration of the firſt leaſe ſo recited; becauſe the jury do not actually find the firſt leaſe, but only a recital of it in another deed, which recital may be falſe for ought that appears to the Court; and then the ſecond leaſe ſhall begin preſently, as if no ſuch firſt leaſe were at all, ſince the not finding it effectually is as if there were none ſuch made. Bac. Abr. tit. Leaſes (L. 2.)

With regard to the date of a leaſe, it was formerly held that a leaſe to commence *à datu* included the day of the date, but that *a die datus* excluded the day. 2 Salk. 413.

But it has ſince been held, that the word "from" may mean either incluſive or excluſive, according to the context and ſubject matter. Cowp. 714.

Therefore, where the plaintiff in ejectment declared upon a leaſe for years, *habendum* from the ſealing and delivery, and declared that the ſealing and delivery was 1° *Maii*, and that the ejectment was the ſame day; it was moved in arreſt of judgment, that the ejectment could not be ſuppoſed the ſame day, for the leaſe did not begin till the next day enſuing the ſealing and delivery. But the Court diſallowed the exception; for where the leaſe is to begin from the time of the ſealing and delivery, or generally to hold for twenty-one years next following, the ejectment may well be ſup- Bac. Abr. tit. Leaſes (L. 2.)

poſed to be the ſame day: for the beginning of the leaſe is preſently upon the ſealing and delivery; and therefore ſuch leaſe ſhall end at the ſame time and hour.

Cro. Jac. 258. A leaſe "from the day of the date," and "from hence-"forth," is the ſame thing.

Bac. Abr. *ut ante.* Indeed, as to the date, that may be conſidered at either as an impoſſible date, or an uncertain date, between which the general difference taken in the books is, that if a leaſe be made to begin from an impoſſible date, there the leaſe ſhall take effect from the delivery; becauſe it could not be any part of the agreement between the parties, as from the 30th day of *February*, or the 32d day of *April* next:—but where the limitation is uncertain, as a leaſe made the 10th day of *October*, *habendum* from the 20th day of *November*, without ſaying what *November* was meant, whether laſt-paſt, or next enſuing, or what other *November*, the leaſe is thereby vitiated, becauſe the limitation was part of the agreement, but the Court cannot determine it, not knowing how the contract was.

1 Mod. 180.

Bac. Abr. *ut ante.* So, where a leaſe is made to begin from the nativity of our Lord laſt paſt, without ſaying from the feaſt of the nativity, this leaſe ſhall begin preſently; becauſe it could be no part of the agreement between the parties that the leaſe ſhould begin from the nativity itſelf, which is paſt ſo many hundred years ago; and therefore for this impoſſibility of relation; the leaſe ſhall begin preſently:—but if it were to begin from the nativity of our Lord generally, or next enſuing, omitting the word feaſt, *Twiſden* was of opinion that ſuch a leaſe ſhould be void for the uncertainty of the commencement; but *Siderfin* in reporting the caſe, makes a *quære*, if it ſhall not begin preſently; and in truth, this ſeems the moſt reaſonable opinion, for as to impoſſibility of relation, there is the ſame in this as there is in the other, and therefore by the ſame reaſon, it ſhall begin preſently. The editor of *Bacon* aſks what ſound reaſon can be aſſigned why it ſhould not commence from the *Chriſtmas* intended by the parties? which well applies to the leaſe to begin from the nativity of our Lord next enſuing; if not to the former.

Sid. 461.

Bac. Abr. *ut ante.* Where leſſee for an hundred years made a leaſe for forty years to *B.* if he ſhould ſo long live, and after leaſed the ſame

ſame lands to *C. habendum* for twenty-one years from the end of the term of B. to begin and be accounted from the date of theſe preſents; and the queſtion was, if the leaſe to be ſhould be ſaid to begin preſently, or after the term of *B?* the judges were clearly of opinion, that the leaſe to *C.* ſhould not be accounted from the time of the date, but from the end of the term of *B.* becauſe by the firſt words it is a good leaſe in reverſion in that manner, and then it ſhall not be made void by any ſubſequent words, or as *Coke* ſaid, the laſt words ought to be conſtrued to give an intereſt as a future intereſt preſently, and the actual poſſeſſion after the expiration of the firſt forty years is well granted by the firſt words.

In ejectment the plaintiff declared upon a leaſe made 14th *Jan.* 30 *Eliz.* from *Chriſtmas* before for three years, and upon evidence the plaintiff ſhewed a leaſe bearing date 13th *Jan.* the ſame year, and proved to have been then executed; and it was moved, for this variation between the declaration and the evidence, that the jury might be diſcharged: but *Anderſon* C. J. ſaid, that the evidence was ſufficient to ſupport the declaration; for if the leaſe was ſealed and delivered 13th *Jan.* it was then a leaſe 14th *Jan. quod ceteri juſticiarii conceſſerunt* Bac. Abr. tit. Leaſes (L. 1.)

A leaſe may commence at one day, in point of computation, and at another in point of intereſt. 2 Bur. 1090.

Therefore, a leaſe "to hold from a day paſt for fifty years "then next enſuing, the ſaid term to commence and begin "immediately after the determination of an exiſting leaſe "in the ſame premiſſes," was not eſteemed uncertain at its commencement. *Ibid.*

So, a leaſe *habendum* to the leſſee for his life, which term ſhall begin after the determination of a previous term for three lives, is good. Cro. Eliz. 269.

So, if an indenture of demiſe bear *teſte* 25th *March*, 15 *Car.* and is delivered the day of the date, and the *habendum* is from and after the day of the date of theſe preſents, for and during the time and term of ſeven years from henceforth next and immediately following, fully to be compleat and ended, this leaſe begins in computation from the delivery of the deed, which was the day of the date, and Bac. Abr. *ut ante.*

in intereſt the next day after the date, and ſo all the words will have an operation: for it appears that he was not to have the poſſeſſion till the next day after the date, by the words *habendum* from and *after* the day of the date, which excludes the day of the date; but that the ſeven years ſhould commence by computation from the delivery, *viz.* from henceforth, which refers to the limitation of the ſeven years.

Ibid. In ejectment the plaintiff declared, that *J. S.* demiſed to him *per quodd' ſcriptum obligatorium* ſuch lands *habend' à die datus indenturæ prædict'*; on not guilty pleaded, it was found and adjudged for the plaintiff in *Ireland:* and it being aſſigned for error here, that there was no time ſpecified when this leaſe ſhould begin, for it was *habend' à die datus indenturæ prædict'*; and no indenture was mentioned before, but only *ſcriptum obligatorium;* yet *per Curiam* it was reſolved, that the writing ſhould be intended an indenture, though improperly called *ſcriptum obligatorium*, for every deed obligeth; or if it ſhould not be intended an indenture, then it begins preſently, as if it had been from an impoſſible limitation, as the 40th of *Sept.* or ſuch like.

Shep. Touch. 272. But all leaſes for years, whether they begin *in præſenti*, or *in futuro*, muſt be certain; that is, they muſt have a certain beginning, and certain ending, and ſo, the continuance of the term muſt be certain; otherwiſe they are not good.

Ibid. Yet if the years be certain, when the leaſe is to take effect in intereſt or poſſeſſion, it is ſufficient, for until that time it may depend upon an uncertainty, *viz.* upon a poſſible contingent precedent before it begin in poſſeſſion or intereſt, or upon a limitation or condition ſubſequent; but in caſe it is to be reduced to a certainty upon a contingent precedent, the contingent muſt happen in the lives of the parties: and though there appear no certainty of years in the leaſe, yet if by reference to a certainty it may be made certain, it is ſufficient.

3 T. R. 463. As, if a leaſe be granted for twenty-one years after three lives in being; though it is uncertain at firſt when that term will commence, becauſe thoſe lives are in being, yet when they die it is reduced to a certainty, and *id certum eſt quod certum reddi poteſt*, that is certain which can be rendered ſo.

So

So if *A.* ſeiſed of lands in fee, grant to *B.* that when *B.* ſhall pay to *A.* twenty ſhillings, that from thenceforth he ſhall hold the land for twenty-one years, and after *B.* pays the twenty ſhillings; in this caſe, *B.* ſhall have a good leaſe for twenty-one years from thenceforth. Shep. Touch. 273.

So if *A.* grant to *B.* that if his tenant for life ſhall die, that *B.* ſhall have the land for ten years, this is a good leaſe: and if one makes a leaſe for years after the death of *C.* if *C.* die within ten years; this is a good leaſe if *C.* die within the ten years, otherwiſe not. *Ibid.*

So, if a leaſe for years be made of land in leaſe for life, to have and to hold from the death of the tenant for life;—or to have and to hold from *Michaelmas* next after the death of the tenant for life;—or from *Michaelmas* next after the determination of the eſtate of the tenant for life; theſe are good leaſes. *Ibid.*

Even if one make a leaſe to begin after the death of *J.S.* and to continue until *Michaelmas*, which ſhall be *anno Domini* 1650, this is a good leaſe. *Ibid.*

So, if a man make a leaſe to *B.* for ninety years, to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others; and afterwards makes another leaſe of the land, *habendum* after the determination or redemption of the former leaſe; it ſeems this is a good leaſe and certain enough. *Ibid.* 274.

So, if a man have a leaſe of land for an hundred years, and he make a leaſe of this land to another, to have and to hold to him for forty years, to begin after his death; this is a good leaſe for the whole forty years, if there ſhall be ſo many of the hundred years to come at the time of the death of the leſſor. So if he grant all his eſtate, or all his term, or all his intereſt, in the premiſes of the deed, and then ſay, to have and to hold the land, *&c.* to the grantee for all the reſidue of the term of an hundred years that ſhall be to come at the time of his death; by this the whole eſtate and intereſt of the grantor in the land doth paſs preſently, by theſe words in the deed: and if in this caſe the leſſee for an hundred years make a leaſe of the land, to have and to hold after his death for an hundred years; this will be a good *Ibid.* 273.

leaſe for as many of the firſt hundred years as ſhall be to come at the time of his death.

Ibid. 274. So, if *A.* doth make a leaſe of land to *B.* for ſo many years as *B.* hath in the manor of *Dale*, and *B.* hath then a leaſe for ten years in ſuch manor; this is a good leaſe for ten years.

Ibid. So, if a leaſe be made during the minority of *J. S.* or until *J. S.* ſhall come to the age of twenty-one years, theſe are good leaſes; and if *J. S.* die before he come to his full age, the leaſe is ended. So, if a man make a leaſe for twenty-one years, if *J. S.* live ſo long;—or if the coverture between *J. S.* and *D. S.* ſhall ſo long continue;—or if *J. S.* ſhall continue to be parſon of *Dale* ſo long; theſe and ſuch like leaſes are good.

Bac. Abr. tit. Leaſes (L. 1.) If one makes a leaſe to *A.* for twenty-one years, and after makes another leaſe to *B.* for years, to begin from the end and expiration of the aforeſaid term of twenty-one years demiſed to *A.*; and then the leaſe to *A.* is determined, either by an expreſs ſurrender, or by an implied ſurrender in law, as by *A.*'s acceptance of a new leaſe for life from the leſſor, the leaſe to *A.* ſhall begin preſently; but if the leaſe to *B.* had been to begin after the end and expiration of the aforeſaid twenty-one years, there the leaſe to *B.* ſhould not begin upon the ſurrender, forfeiture, or other determination of the firſt term to *A.* till the twenty-one years actually run out by effluxion of time; the reaſon of which difference is, that in the firſt caſe the word "term" comprehends as well the eſtate or intereſt in the land, as the time for which it is demiſed, and therefore, the ſecond leaſe being limited to begin *from* the end and expiration of the aforeſaid term of twenty-one years, whenever the term is determined, the leaſe to *B.* ſhall begin; but in the other caſe, the leaſe to *B.* is not to begin till *after* the end and expiration of the twenty-one years, which cannot be ended but by effluxion of time.

Cro. Jac. 71. So, it was held that a proviſo in a leaſe for years to *A.* to re-enter if leſſee died within the term, is a mere condition; and not a limitation; and a ſecond leaſe *habendum cum poſt mortem ſive per mortem ſurſum redditionem ſeu forisfactu-*

ram

ram prædicti A. vacari acciderit, is good, and commences when the firſt term is determined by effluxion of time.

So, if one makes a leaſe to another for ſo many years as *J. S.* ſhall name, this at the beginning is uncertain; but when *J. S.* hath named the years, (in the life-time of the leſſor), this aſcertains the commencement and continuance of the leaſe accordingly.—But if the leaſe had been made for ſo many years as the executors of the leſſor ſhould name, this could not be made good by any nomination; becauſe to every leaſe there ought to be a leſſor and leſſee; and here the nomination which aſcertains the commencement not being appointed till after the death of the leſſor, makes the leaſe defective in one of the main parts of it, *viz.* a leſſor, and therefore of conſequence muſt be void; which is alſo the reaſon that in the firſt caſe the nomination ought to be made in the life-time of the leſſor, and not by *J. S.* after his death, for then it will be void. Bac. Abr. tit. Leaſes (L. 2.)

A leaſe in reverſion of ſeveral parcels of land, made to commence on the happening of ſeveral contingencies, ſhall take effect and commence reſpectively as thoſe contingencies happen. Cro. Eliz. 199.

In a caſe where *B.* had a leaſe for twenty-one years of copyhold lands, to commence after the determination of the eſtate which *A.* at that time had therein, and the widow of *A.* being entitled to her free-bench, and happening to outlive her huſband twenty-one years, it was held by the Lord Chancellor, that the eſtate of the wife was only an excreſcence of her huſband's eſtate, which did not determine till the wife's death, at which time the leaſe made to *B.* ſhould commence and continue for twenty-one years. Bac. Abr. *ante.*

A leaſe for years, reſerving rent "after the rate" of 18*l.* a year, is void for uncertainty. 1 Mod. 78.

As to leaſes void for uncertainty in reſpect to the time of their commencement, if *A.* be ſeiſed of land in fee, and leaſe it to *B.* for ten years, and it is agreed between them that *B.* ſhall pay to *A.* 100*l.* at the end of the ſaid ten years, and that if he do ſo and ſhall pay the ſaid 100*l.* and 100*l.* at the end of every ten years, that then the ſaid *B.* ſhall have a perpetual demiſe and grant of the premiſſes from ten years to ten years continually following *extra memoriam hominum,* Shep. Touch. 273.

dominum, &c.; this, although it be a good leaſe for the firſt ten years, yet it is void for all the reſt for uncertainty.

Ibid. 174. So, if the leſſor grant the land to another, to have and to hold to him for and during all the reſidue of the term of one hundred years that ſhall be to come at the time of the death of the grantor, this is void for uncertainty: had he granted all his eſtate, or term, or intereſt, it had been otherwiſe. *Vide ante*, p. 135.

Ibid. So, it is ſaid, if a leaſe be made to *A.* for eighty years, if he live ſo long, and if he die within the ſaid term or alien the premiſſes, that then his eſtate ſhall ceaſe; and then he doth further by the ſame deed grant and let the premiſſes for ſo many years as ſhall remain unexpired after the death of *A.* or alienation, to *B.* for the reſidue of the *ſaid term* of eighty years, if he ſhall live ſo long: in this caſe the leaſe to *B.* is void; for after the death of *A.* the term is at an end; but if he ſay for the reſidue of the eighty years, it is otherwiſe.

Ibid. So, a leaſe made to another until a child in its mother's belly ſhall come to the age of twenty-one years, is not good.

Ibid. 175. So, if *A.* make a leaſe to *B.* for ſo many years as *A.* and *B.* or either of them ſhall live, not naming any certain number of years, this cannot be a good leaſe for years.

Ibid. So, if the parſon of *Dale* make a leaſe of his glebe for ſo many years as he ſhall be parſon there; this is not certain, neither can it be made ſo by any means; and yet if a parſon ſhall make a leaſe from three years to three years ſo long as he ſhall be parſon, this is a good leaſe for ſix years, if he continue parſon ſo long, and for the reſidue void for uncertainty.

Ibid. So, if I make another a leaſe of land, until he be promoted to a benefice; this is no good leaſe for years, but void for uncertainty.

Ibid. So, if I have a piece of land of the value of 20*l. per annum*, and I make a leaſe of it to another, until he ſhall levy out of the profits thereof 100*l.* this is no good leaſe for years, but void for uncertainty.—But if I have a rent-charge of 20*l. per annum*, and let it to another until

he ſhall have levied 100*l.* this is a good leaſe for five years.

Note.—In all theſe caſes of uncertain leaſes made with limitations as aforeſaid, as until ſuch a thing be done, or ſo long as ſuch a thing continue, *&c.* if livery of ſeiſin be made upon them, they may be good leaſes for life, determinable upon theſe contingences, albeit they be no good leaſes for years. *Ibid.*

In leaſes for years, or other chattel intereſts, livery of ſeiſin is not neceſſary; but inſtead thereof an actual entry is requiſite, to veſt the eſtate in the leſſee: for to many purpoſes he is not tenant for years until he enter. 2 Bl. Com. 314. *Ibid.* 144. Co. Lit. 46. *b.*

Before entry the leſſee hath but an *intereſſe termini*, an intereſt of a term, and no poſſeſſion; and therefore a releaſe, which enures by way of enlarging an eſtate, cannot work without a poſſeſſion, for before poſſeſſion there is no reverſion. Such is the caſe of leaſes at common law; for if it be ſo framed as to be a bargain and ſale under the ſtatute, the poſſeſſion is immediately executed in the leſſee, ſo that no entry is neceſſary. *Ibid.* 270. & 4.

Yet if a tenant for twenty years in poſſeſſion make a leaſe to *B.* for five years, and *B.* enter, a releaſe to the firſt leſſee is good, for he had an actual poſſeſſion, and the poſſeſſion of the leſſee is his poſſeſſion. So it is if a man make a leaſe for years, the remainder for years, and the firſt leſſee doth enter, a releaſe to him in the remainder for years is good to enlarge his eſtate. A releaſe therefore that enures by enlargement cannot work without a poſſeſſion; but an actual eſtate in poſſeſſion is not neceſſary, for a veſted intereſt ſuffices for ſuch a releaſe to operate upon.—But leſſee may releaſe the rent reſerved before entry, in reſpect of the privity. *Ibid.*

Neither can the leſſor grant away the reverſion by the name of the reverſion before entry, unleſs the leſſee attorns, which is now unneceſſary. *Ibid.* 46. *b.* Jon. 8.

If a man make a leaſe for a thouſand years, this leaſe is perfect by the delivery of the deed without any livery of ſeiſin. Shep. Touch. 211.

The intereſt, *intereſſe termini*, which the leſſor hath before entry, is grantable to another; and although the leſſor die Co. Lit. 46. *b.*

before

before the leſſee enter, yet the leſſee may enter into the lands: ſo, if the leſſee die before he enter, yet his executors or adminiſtrators may enter, becauſe he preſently by the leaſe hath an intereſt in him; and if it be made to two, and one die before entry, his intereſt ſhall ſurvive.

Com. Dig. tit. Eſtates (G. 14.)

This *intereſſe termini* is in the leſſee, whether the leaſe be made to commence immediately, or at a future day.

2 Bl. Com. 314.

This entry by the tenant himſelf ſerves the purpoſe of notoriety, as well as livery of ſeiſin from the grantor could have done; which it would have been improper to have given in this caſe, becauſe that ſolemnity is appropriated to the conveyance of a freehold.

Ibid. 144.

When the leſſee therefore has actually ſo entered, and thereby accepted the grant, the eſtate is then and not before veſted in him, and he is poſſeſſed, not properly of the land, but of the term of years; the poſſeſſion or ſeiſin of the land remaining ſtill in him who hath the freehold.

Duration of a Leaſe for Years.

Bac. Abr. tit. Leaſes (L. 3.)

As to the certainty of leaſes for years, in reſpect of their continuance or duration, this ought to be aſcertained either by the expreſs limitation of the parties at the time of the leaſe made, or by a reference to ſome collateral act, which may with equal certainty meaſure the continuance thereof; otherwiſe it will be void.

Ibid.

If a man makes a leaſe for years, without ſaying how many, this ſhall be a good leaſe for two years certain; becauſe for more there is no certainty, and for leſs there can be no ſenſe in the words.

Ibid.

If a man leaſes lands for ſuch a term as both parties ſhall pleaſe, this is but a leaſe at will; becauſe what that term will be is utterly uncertain, and the pleaſure of the parties ſeems to be limited to attend the continuance as well as the commencement and firſt fixation thereof.

Ibid.

So, if a parſon makes a leaſe for a year, and ſo from year to year as long as he ſhall continue parſon, or as long as he ſhall live; this is a leaſe for two years at leaſt, if he lives and continues parſon ſo long; and after the two years, or at moſt after three years, but an eſtate at will for the uncertainty, unleſs livery be made.

Ibid.

A parſon made a leaſe of his rectory to one for three years, and at the end of thoſe three years, for other three years,

years, and ſo from three years to three years, during the life of the leſſor: the whole Court held it clearly a leaſe for twelve years; but by *Dodderidge*, if the leaſe had been for three years, and ſo from three years to three years, and ſo from the ſaid three years to three years, this had been but a leaſe for nine years; becauſe the words "from *the ſaid* "three years" tie up the relation retroſpectively to the three years laſt mentioned, which make in all but ſix years, and then there are but three years more added, which make the whole but nine years; and for the words "during the life "of the leſſor," they cannot enlarge it to any further certain number of three years, by reaſon of the uncertainty of the leſſor's life, and therefore beyond the twelve years, or nine years, it amounts only to a leaſe at will, unleſs livery were made, which muſt neceſſarily paſs a freehold determinable upon the leſſor's death.

Yet in one book, where a leaſe was made for three years, and after the end of thoſe three years, for other three years, and ſo from three years to three years, during the life of the leſſor, this was held to be only a leaſe for nine years; becauſe the words "and ſo from three years" ſhall be referred to the three years laſt mentioned, for otherwiſe theſe words would exclude the three years next after the ſix years, and make the three laſt years to begin after nine years, and ſo make a chaſm in the leaſe by ſhutting out the three years next after the ſix years, ſo as for the three laſt years it ſhould be only a future intereſt; which caſe ſeems to be of a new ſtamp, and to thwart the preceding caſe as to the reſolution of it being a leaſe for twelve years; and that *Jones* and *Wild* held, that a leaſe from three years to three years, was but a leaſe for three years to commence *in futuro*. *Ibid.*

One made a leaſe for three years, and ſo from three years to three years until ten years be expired; this was reſolved to be a leaſe but for nine years, and that the odd year ſhould be rejected, becauſe that cannot come to fall within any three entire years according to the limitation, which in this caſe are to be taken all together as one year, or elſe ſo much of the limitation as cannot come within that deſcription muſt be rejected; and this ſeems to agree with *Brooke* [tit. *Leaſes*,] and *Plowden*, [*Reports* 273, 522, *a.*] who in general

neral hold a limitation in that manner, from year to year, for forty, fifty, or one hundred years, to be a good leaſe for the whole term, becauſe there is no ſuch break of an odd year at the latter end of the leaſe, as there is in the other caſe.

2 Salk. 414. A parol demiſe to hold from year to year, and ſo on as long as it ſhall pleaſe both parties, is a leaſe for two years, and after every ſubſequent year begun, is not determinable till that year be ended; and ſuch an executory contract is not void by the ſtatute of Frauds, though it be for more than three years; becauſe there is hereby no term for above two years ever ſubſiſting at the ſame time, and there can be no fraud to a purchaſer, for the utmoſt intereſt that can be to bind him can be only one year.

2 Bur. 1034. A leaſe "for ſeven, fourteen, or twenty-one years, as "the leſſee ſhall think proper," upon which the leſſee enters and continues in poſſeſſion, is undoubtedly a good leaſe for ſeven years, whatever may be its validity as to the two other eventual terms of fourteen and twenty-one years.

3 T. R. 462. So, a leaſe in 1785, for three, ſix, or nine years, determinable in 1788, 1791, and 1794, is a leaſe for nine years, determinable at the end of three or ſix years, by either of the parties, on giving reaſonable notice to quit.

Bac. Abr. tit. Leaſes (L. 3.) One lets a ſtable for a week for 8*s.* and ſo from week to week at 8*s.* a week, as long as both parties pleaſed; this was held at moſt but a leaſe for three weeks certain, and for the reſidue at will; ſo that the leſſee at the end of the three weeks was not puniſhable for negligently keeping his fire, that being only an involuntary waſte, wherewith leſſee at will is not chargeable.

Ibid. (L. 4.) Where a leaſe is to two for forty years, if they ſo long live, *Rolle* [in his Reports, 309, 310.] ſeems to think that this does not determine by the death of one of them, becauſe it is an intereſt in both, which ſhall ſurvive; but the other books are againſt it; becauſe their life is but a collateral condition and limitation of the eſtate, which therefore is broken when one dies:—this differs therefore from a leaſe to two perſons for their lives, for that gives an eſtate to both for their lives, and both have an eſtate of freehold therein in their own right; which conſequently cannot determine

termine by the death of one of them, for then the other could not be ſaid to have an eſtate for his life, as the leſſor at firſt gave it.

So, where one made a leaſe for forty years, "if his wife "or any of their iſſue ſhould ſo long live;" it was adjudged that the leaſe was not determined by the death of one of them, but ſhould continue till all were dead by reaſon of the disjunctive *or*, which goes to and governs the whole limitation: but if the words had been "if his wife "and iſſue ſhould ſo long live," there clearly, by the death of any of them within the forty years, the term had been at an end, by reaſon of the copulative *and*, which conjoins all together, and makes all their lives jointly the meaſure of the eſtate. Cro. Eliz. 470: Co. Lit. 225. a.

A leaſe was made for twenty-one years, if the leſſee lived ſo long and continued in the leſſor's ſervice: the leſſor dies; and, Whether the term was determined? was the queſtion. Three of the Juſtices held, that the leaſe continued; for there is not any *laches* in the leſſee that he did not ſerve, but it is the act of God that he did not ſerve any longer: but the fourth was ſtrongly againſt it; becauſe it is a limitation to the eſtate, that it ſhall not continue longer than he ſerves: [which it is conceived was the right conſtruction; but even if it were erroneous, the death of the leſſee, according to the very terms of the demiſe, was to determine the leaſe.] Cro. Eliz. 643.

If a perſon, having an intereſt for three years only, make a leaſe for five years, it would be good for the three years: for where an authority is given to any one to execute any act, and he executes it contrary to the effect of his authority, this is utterly void; but if he executes his authority and withal goes beyond the limits of his warrant, this is void for that part only wherein he exceeds his authority. Bull. N. P. 106. Comp. Copy. 93.

If a leaſe be made for life or years to *A.* and afterwards the leſſor makes a leaſe for years to *B.* regularly, this concurrent leaſe to *B.* is a good leaſe at leaſt for ſo many years of the ſecond leaſe as ſhall be to come after the firſt leaſe is determined according to the agreement: as if the Shep. Touch. 275.

firſt

firſt leaſe to *A.* be for twenty years, and the ſecond leaſe to *B.* be for thirty years, and both begin at one time, in this caſe the ſecond leaſe is good for the laſt ten years.

Com. Dig. tit. Eſtates (G. 13.) One who has a power to grant a concurrent leaſe within ſeven years of the expiration of the old one, may grant a leaſe at any time on the ſurrender of the old one.

6 Mod. 73. If the lord of a manor may by the cuſtom grant copyhold eſtates "to three perſons *habendum* to them ſucceſſively, "as they ſhall be named and not otherwiſe," a ſurrender to *A.* for his own life, and for the lives of *B.* and *C.* is warranted by the cuſtom.

Co. Lit. 46. Although, as hath been ſaid, a leaſe for years muſt have a certain beginning, and a certain end, yet the continuance thereof may be uncertain, for the ſame may ceaſe and revive again in divers caſes. As if tenant in tail make a leaſe for years reſerving 20*s.* and after take a wife and die without iſſue; now as to him in the reverſion the leaſe is merely void: but if he endow the wife of tenant in tail of the land (as ſhe may be though the eſtate tail be determined) now is the leaſe as to tenant in dower (who is in of the eſtate of her huſband) revived again as againſt her, for as to her the eſtate tail continues, for ſhe ſhall be attendant for the third part of the rent-ſervices, and yet they were extinct by act in law. So it is, if tenant in tail make a leaſe for years as before, and die without iſſue, his wife enſient with a ſon, and he in the reverſion enter againſt whom the leaſe is void; but after the ſon be born the leaſe is good, if it be made according to the ſtatute, and otherwiſe is voidable. So, if tenant in fee-ſimple take a wife, and then make a leaſe for years, and die, and the wife is endowed; in this caſe ſhe ſhall avoid the leaſe, but after her deceaſe the leaſe ſhall be in force again.

32 H. 8. c. 28. Shep. Touch. 275.

Cro. Car. 101. So, a rent-charge for life is ſuſpended by the acceptance of a leaſe of the land; and by the ſurrender of ſuch leaſe, revives again.

Termination of a Leaſe for Years. With reſpect to the termination of a leaſe, a demiſe may be determined by either of theſe circumſtances occurring; namely, by the period expiring during which the premiſſes were leaſed, which may take place upon the contingency, if

if there be any, happening; by ſurrender to the leſſor; or by forfeiture for the breach of ſome contract expreſs or implied.

The common means whereby a leaſe determines, is by the period expiring for which the lands, *&c.* were demiſed; or upon the contingency happening that was to create, as it were, ſuch period; as where a leaſe is made during the minority of *J. S.* when *J. S.* comes to his full age the leaſe terminates; or if he die before, it is alſo ended. 1. *Termination by Effluxion of Time.*

Where the leaſe is expired, the tenant ſtill continues liable, unleſs he deliver up compleat poſſeſſion of the premiſſes, or the landlord accepts of another in his room. 1 Eſp. R. 571

The circumſtance of the landlord ſigning a notice, by which a tenant, whoſe leaſe is expired, orders his undertenant to pay his rent to him in future, is not evidence of his agreement to accept him as his tenant, unleſs it be proved that he knew the contents of the notice. *Ibid.*

Another means, whereby a leaſe for years may be defeated, is by way of merger, that is, when there is an union of the freehold or fee and term of years in one perſon at the ſame time; in which caſe the greater eſtate merges or drowns the leſſer, becauſe they are inconſiſtent and incompatible. 2. *Termination by Merger.* Bac. Abr. tit. Leaſes (R.)

Thus, if a leaſe for years be made to commence after the death of *A.* and the grantee of the inheritance afterward makes a leaſe for years to *B.* and then the leſſee of the future intereſt aſſigns to the grantee of the inheritance, the future intereſt is drowned in the inheritance. Cro. Jac. 619.

So, where a fee-farm rent is purchaſed in, by the perſon that is ſeiſed in fee of the lands out of which it iſſues, it is merged in the inheritance. 10 Mod. 525, 6.

Lord *Coke* lays it down for a general rule, that one cannot have a term for years in his own right and a freehold *in auter droit*, but that his own term ſhall drown in the freehold; and puts theſe caſes: If a man, leſſee for years, intermarries with the feme leſſor, this ſhall merge and drown his own term for years; but if a feme leſſee for years intermarries with the leſſor, her term is not thereby drowned; becauſe, ſays he, one may have a term of years *in auter droit*, and a freehold in his own right, as the huſband in this caſe ſhall have. So if leſſee for years make the leſſor Bac. Abr. *ut ante.* Co. Lit. 338.

his executor, the term is not thereby drowned, becauſe the leſſor hath the term *in auter droit*.—So alſo, if the maſter of an hoſpital, being a ſole corporation, by the conſent of his brethren makes a leaſe for years of the poſſeſſion of the hoſpital, and afterwards the leſſee for years is made maſter, the term is drowned *cauſa qua ſupra*; but if it had been a corporation aggregate, the making of the leſſee maſter had not extinguiſhed the term, no more than if the leſſee had been made one of the brethren: yet if a leſſee for years of the glebe be made parſon, the term is merged by reaſon of the union of the term and freehold in him to his own right and uſe, though he has them in ſeveral capacities.

Cro. Jac. 275. But this rule ſeems to admit of divers exceptions: for if a huſband be poſſeſſed of a term in his own right, and the inheritance deſcend to his wife, the term will not merge by this deſcent *in auter droit*; for it was by act and operation of law. So if a leaſe had been made upon truſt, for the advancement of ſuch a woman, and the leſſee had after intermarried with that woman, and then the inheritance had deſcended to her; this, it was agreed, would not merge the term, but he might clearly diſpoſe thereof to the purpoſe intended; becauſe he had it *in auter droit* and to another uſe.—So, it ſeems to be agreed, that if a man being poſſeſſed of a term for years in right of his wife, purchaſes the inheritance, that by this the term for years, though in right of his wife, is merged and extinct, becauſe the purchaſe was the expreſs act of the huſband, and therefore amounts in law to a diſpoſition of the term, by reaſon of the merger conſequent thereupon: but a bare intermarriage of the feme termor with the reverſioner will not work a merger of the term, becauſe by the intermarriage the term is caſt upon the huſband by act of law, without any concurrence or immediate act done by him to obtain the ſame; and therefore, in ſuch caſe, the law will preſerve the term in the ſame plight as it gave it to the huſband, till he by ſome expreſs act deſtroys it, or gives it away.

Bac. Abr. *ut ante.*

Ibid. Where however the huſband himſelf is leſſee for life, and intermarries with the leſſor, this merges his own term, becauſe he thereby draws to himſelf the immediate reverſion, in nature of a purchaſe by his own voluntary act, and ſo undermines

undermines his own term: whereas, in the other caſe, the term exiſting in the feme till the intermarriage, is not thereby ſo drawn out of her or annexed to the freehold as to merge therein; becauſe that attraction which is only by act of law conſequent upon the marriage, would, by merging the term, do wrong to a feme-covert, and ſo take the term out of her, though the huſband did no expreſs act to that purpoſe, which the law will not allow. But in ſuch caſe, if the feme ſhould ſurvive, and have dower of theſe lands, this ſeems a merger of her term for a third part at leaſt; becauſe now ſhe hath the term and freehold both in her own right, and then the acceſſion of the freehold muſt *pro tanto* merge and drown the term.

But if a feme executrix takes huſband, and the huſband after purchaſes the reverſion, and dies, yet the feme ſurviving ſhall not have the term to any other purpoſe but as aſſets to pay debts; for as to any right of her own therein, the term is extinct by ſuch purchaſe of the huſband, becauſe that was his own expreſs voluntary act, and therefore amounts to a diſpoſition of the term by the merger wrought thereupon. *Ibid.*

Land was given to the huſband and wife, and to the heirs of the huſband; the huſband makes a leaſe for years, and dies, and the wife enters and intermarries with the leſſee: it was holden that this term was not extinct, becauſe the entry of the wife put a total interruption to the intereſt of the leſſee, and avoided the term entirely as to herſelf, becauſe ſhe was in of the freehold by ſurvivorſhip paramount the leaſe, and then the leaſe cannot take place again till after her death againſt the heirs of her huſband, and whether ſhe will outlive the term or not is uncertain; ſo that during her life, the leſſee had no intereſt, but only a bare poſſibility, which cannot be touched or hurt by the intermarriage, but continues juſt as it was before.

As more particular notice of caſes touching this matter would tend little, if at all, to elucidate the ſubject of this work, we ſhall merely mention, that a court of law cannot merge eſtates unleſs it finds them in the ſame perſon, and acquired (ſubject to ſome exceptions) in the ſame right. But courts of equity look into the beneficial intereſts and

views of parties, and do not regard whether the eſtates are ſtrictly in the ſame perſon, or in different perſons. Hence it is a general rule with theſe courts, that where the owner of an eſtate becomes entitled to a charge upon it ſecured by a term of years, ſuch term ſhall ſink for the benefit of the heir. Thus, though the owner were a lunatic, the term ſhall merge; for as between his mere abſolute real and perſonal repreſentatives, no equity can exiſt.—But exceptions to this rule are admitted in ſeveral inſtances.

3. Termination by Surrender

Co. Lit. 337.

A third mode by which a leaſe may be made to determine, is by ſurrender, which properly is a yielding up of an eſtate for life or years to him that hath the immediate eſtate in reverſion or remainder, wherein the eſtate for life or years may drown by mutual agreement: and it differs

Ibid. n. 2. from a releaſe in this reſpect, that the releaſe operates by the greater eſtate deſcending upon the leſs; whereas a ſurrender is the falling of a leſs eſtate into a greater.

2 Bl. Com. 326. A ſurrender is made by theſe words, "hath ſurrendered, "granted, and yielded up." The ſurrenderor muſt be in poſſeſſion, and the ſurrenderee muſt have a higher eſtate, in which the eſtate ſurrendered may merge: therefore tenant for life cannot ſurrender to him in remainder for years. In a ſurrender there is no occaſion for livery of ſeiſin; for there is a privity of eſtate between the ſurrenderor and the ſurrenderee, the particular eſtate of the one and the remainder of the other being one and the ſame eſtate; livery therefore having been once made at the creation of it, there is no neceſſity for having it afterwards.

By the ſtatute of Frauds and Perjuries (29 *Car.* 2. *c.* 3.) it is provided, that no leaſes, eſtates, or intereſts, either of freehold or term of years, ſhall be ſurrendered, unleſs it be by deed or note in writing, ſigned by the party who makes ſuch ſurrender, or ſome other lawfully authorized thereunto, or by act and operation of law.

n. 1. to Co. Lit. 338. It was held, that a leaſe for years cannot be ſurrendered by cancelling the indenture without writing; becauſe the intent of the ſtatute was to take away the manner they formerly had of transferring intereſts in lands, by ſigns, ſymbols, and words only; and therefore, as a livery and ſeiſin on a parol feoffment was a ſign of paſſing the freehold, before

fore the ſtatute, but is now taken away by the ſtatute, ſo the cancelling a leaſe was a ſign of a ſurrender before the ſtatute, but is now taken away, unleſs there be a writing under the hand of the party. It has alſo been held, that the ſtatute does not make a deed abſolutely neceſſary to a ſurrender; for it directs it to be made either by deed or note in writing; which note in writing, though not a deed, muſt, it is conceived, be ſtamped, according to ſtat. 23 *G.* 3. *c.* 58. *s.* 1.

As to what eſtate a ſurrender may operate upon, it was once doubted whether years could merge in years; but it ſeems to be now ſettled, that if a term in reverſion be greater than a term in poſſeſſion, the greater would merge the leſſer, as ten years may be ſurrendered and merge in twelve or fourteen years. Bac. Abr. tit. Leaſes (S 2) Cro. Eliz. 302.

Even though the reverſion were for a leſs number of years, yet the ſurrender would be good, and the firſt term drowned; as if one were leſſee for twenty years, and the reverſion expectant thereupon were granted to one for a year, who granted it over to the leſſee for twenty years, this would work a ſurrender of the twenty years term, as if he had taken a new leaſe for a year of his leſſor: for the reverſionary intereſt coming to the poſſeſſion drowns it, and the number of years is not material, for as he may ſurrender to him who hath the reverſion in fee, ſo he may to him who hath the reverſion for any leſſer term. *Ibid.* 1 Ld Raym 402.

It was held therefore, that where leſſee for twenty years makes a leaſe for ten years, and the leſſee for ten years ſurrenders to his leſſor, *viz.* to the leſſee for twenty years, that this is good, and the leſſor ſhall have ſo many of the years as were then to come of his former term of twenty years, that is, as it ſeems, ſo many years as were to come of his reverſion ſhall be now changed into poſſeſſion. *Ibid.* Poph. 39.

Whether a leaſe for years in poſſeſſion may be ſurrendered ſo as to be merged in a leaſe in remainder, be the term in remainder greater or leſſer than the term in poſſeſſion, ſeems to be no where ſettled: an eſtate for life however cannot, it is conceived, be ſurrendered to or merge in a reverſion, if it be only for years, but this is held otherwiſe elſewhere. Bac. Abr. *ut ante.* Shep. Touch. 310. & Com. Dig tit. Surrender (L. 1.)

Surrenders in law, or implied ſurrenders, are excepted in Stat. 29. C. 2. c. 3.

the ſtatute of Frauds, and remain as they did at common law, if the leaſe, which is to draw out ſuch ſurrender, be in writing purſuant to that ſtatute.

Bac. Abr. tit. Leaſes (S 3.) Cro. Eliz. 521, 605.

As to the ſurrender in law of leaſes in poſſeſſion, this is wrought by acceptance of a new leaſe from the reverſioner, either to begin preſently, or at any diſtance of time during the continuance of the firſt leaſe: the reaſon why ſuch acceptance of a new leaſe amounts to a ſurrender and determination of the firſt is, becauſe otherwiſe the leſſee would not have the full advantage that he had contracted for by acceptance of the ſecond leaſe, if the firſt ſhould ſtand in the way and conſume any of thoſe years compriſed in the ſecond leaſe; for which reaſon, and to enable the leſſor to perfect and make good his ſecond contract, the leſſee muſt be ſuppoſed to waive and relinquiſh all benefit of the firſt.

Shep. Touch. 301.

If therefore leſſee for life, or years, take a new leaſe of him in reverſion, of the ſame thing in particular contained in the former leaſe for life or years, this is a ſurrender in law of the firſt leaſe.

Com. Dig. tit. Surrender (L. 1.)

So, if leſſee for years accept a new leaſe from the guardian in ſocage.

Cro. Eliz. 522.

So, if leſſee for twenty years takes a leaſe for ten years, to begin at *Michaelmas*, there is no doubt but that the term of twenty years is ſurrendered or determined preſently; for by the leſſee's acceptance the leſſor hath power to make a new leaſe during the former, and at the time of the leaſe making.

Shep. Touch. 302.

If there be two leſſees for life, or years, and one of them take a new leaſe for years, this is a ſurrender of his moiety; whereby it appears, that a ſurrender in law may be made of ſome eſtates which cannot be ſurrendered by a ſurrender by deed; for *potior eſt diſpoſitio legis quam hominis.*

Bac. Abr. tit. Leaſes (S. 3.)

If *A.* lets to *B.* for ten years, who lets to *C.* for five years, *C.* cannot ſurrender to *A.* by reaſon of the intermediate intereſt of *B.* but in ſuch caſe *B.* may ſurrender to *A.* and after ſo many years *C.* likewiſe, becauſe then his leaſe for five years is become immediate to the reverſion of *A.*

Cro. Jac. 177.

Where the leſſee for years of a houſe accepts a grant of the cuſtody of the ſame houſe, it is a ſurrender, and has been

been ſo adjudged; for the cuſtody of the ſame thing which was let before, is another intereſt in the ſame thing leaſed, and cannot ſtand with the firſt leaſe.

If the firſt leaſe be of the land itſelf, and the ſecond leaſe is of the veſture of the ſame land, this is held to be a ſurrender of the firſt leaſe.

So, if leſſee accepts a grant of common, or rent out of the ſame land, to commence at a certain day within the term. Com. Dig. tit. Surrender (L. 1.)

So, if the grantee of an office accepts a new grant of the ſame office, it will be a ſurrender. *Ibid.*

If leſſee re-demiſe his whole term to his leſſor, it is a ſurrender in law, and as fully as if it had been actually ſurrendered; and this notwithſtanding a reſervation of rent be made. 2 Mod. 175.

So, where a leaſe came into the hands of the original leſſor, by an agreement entered into between him and the aſſignee of the original leſſee, "that the leſſor ſhould have "the premiſſes as mentioned in the leaſe, and ſhould pay a "particular ſum over and above the rent annually, towards "the good will already paid by ſuch aſſignee," it was adjudged that ſuch agreement operated as a ſurrender of the whole term. 1 T. R. 441.

Leſſee for years to begin preſently cannot, till entry or waiver of the poſſeſſion by the leſſor, merge or drown the ſame by any expreſs ſurrender; becauſe till entry there is no reverſion wherein the poſſeſſion may drown: but if the leſſee had entered, and aſſigned his eſtate to another, ſuch aſſignee before entry might have ſurrendered his eſtate to the leſſor, becauſe by the entry of the leſſee the poſſeſſion was ſevered and divided from the reverſion, which poſſeſſion, being by the aſſignment transferred to the aſſignee, may without other entry be ſurrendered, and drown in the reverſion. Bac. Abr. tit. Leaſes (. 2.)

If there be two joint-tenants, and one of them have the particular eſtate, and the other the fee-ſimple; as where an eſtate is limited to two and the heirs of one of them, and he that hath the eſtate for life aliens his part to a ſtranger, in this caſe the alienee may ſurrender to the other joint-tenant:—ſo, if there be three joint-tenants for life, and the Shep. Touch. 303.

fee-ſimple is limited to the heirs of one of them, and one of the joint-tenants for life releaſes to the other, and he to whom this releaſe is made ſurrenders to him that hath the fee-ſimple, this is a good ſurrender of a third part. But otherwiſe one joint-tenant cannot ſurrender to another joint-tenant, although he who makes the ſurrender be tenant for life, and he to whom it is made be tenant in fee-ſimple.

Ibid. One executor may ſurrender an eſtate or leaſe for years, which the executors have in the right of their teſtator.

Ibid. But if one enter into land, and make a leaſe for the trial of the title only, and afterwards the leſſor (he and the leſſee being both out of poſſeſſion) make another leaſe of the ſame thing to the leſſee, it ſeems this is no ſurrender of the firſt leaſe; but if the leſſor enter before he make the leaſe, *contra.*

Ibid. Such perſons as are diſabled to grant, are diſabled to ſurrender; and ſuch perſons as are diſabled to take by a grant, are diſabled to take by a ſurrender: ſo ſuch perſons as may be grantees may be ſurrenderees, therefore a ſurrender to an infant is good, provided it be a ſurrender in law, by the acceptance of a new leaſe, and that ſuch new leaſe increaſe his term or decreaſe his rent; a ſurrender by an infant-leſſee by deed is abſolutely void.

Ibid. If the huſband have a leaſe or eſtate for years in the right of his wife, he alone, or he and his wife together, may ſurrender it; but if the huſband have an eſtate for life in the right of his wife, being tenant in dower or otherwiſe, and he alone, or he and ſhe together, ſurrender it, this ſurrender is good only during the life of the huſband, except it be made by fine.

Bac. Abr. tit. Leaſes (S. 3.) One lets lands to *A.* for life, and twenty years over, and after lets the ſame lands to *B.* for forty years, to commence after the death of *A.* and the end of the ſaid twenty years; then *B.* intermarries with *A.* and *A.* dies, and *B.* the huſband hath the term for twenty years, yet his term of forty years is not ſurrendered by it, becauſe that was not begun, but was a future *intereſſe termini*, to begin wholly after the firſt leaſe ended; ſo there was no union at all of the terms.

Leſſee

Leſſee for twenty-one years took a leaſe of the ſame lands for forty years, to begin immediately after the death of *J. S.* it was held, that this was not any preſent ſurrender of the firſt term, becauſe *J. S.* might wholly outlive that term, and then there would be no union to work a ſurrender; and it being *in equilibrio* in the mean time, whether he will ſurvive it or not, the firſt term ſhall not be hurt till that contingency happens, for if *J. S.* die within the firſt term, then what remains of it is ſurrendered and gone by the taking place of the ſecond. *Ibid.*

Although the ſtatute of Frauds directs that the deed or notice in writing ſhall be ſigned by the ſurrenderor, yet where an agreement was entered into between the leſſor and leſſee, at the inſtance of the former, for the ſurrender of a leaſe, an aſſignment actually prepared, the key delivered up and accepted, and a long acquieſcence on the part of the leſſor, without any claim or demand upon the leſſee; it was decreed in equity that the leſſee ſhould be diſcharged of the rent from the time he had delivered up the key. Bac. on Leaſes, 211.

If in a leaſe determinable on three lives, it is covenanted that on the death of one, the leſſee may if he pleaſe ſurrender, and that the leſſor ſhall thereupon and upon payment of a fine, grant a new leaſe for three lives in the terms of the old leaſe, and in the new leaſe, the covenant to ſurrender as a life drops be made abſolute, equity will aſſiſt the leſſee to retain poſſeſſion as if the prior leaſe had continuance. 9 Mod. 59.

If leſſee reſerve to himſelf any intereſt in or part of the eſtate, it is no ſurrender. For if leſſee for years makes a leaſe to his leſſor for all but a day, this is clearly no ſurrender of his leaſe, becauſe the day disjoins the union, and prevents the merger which would have followed if the leaſe had been for the whole term; for then the leſſor would have had the whole eſtate entire in him, as he had before he made the leaſe, and conſequently the leaſe would be merged and drowned in the reverſion. Com. Dig. tit. Surrender (H.) (L. 2.) Bac. Abr. tit. Leaſes (S. 3.) *Sed. vide* 2 Mod. 275.

So, if he leaſe to his leſſor for the leſſor's life; for he has a poſſibility to have it again. Com. Dig. *ut ante.*

An agreement between the leſſor and a ſtranger that the leſſee ſhall have a new leaſe, is no ſurrender. Cro. Eliz. 173.

If

Com. Dig. *ut ante.* If leſſee accepts a new leaſe in truſt for another, it is no ſurrender.

Cro. Jac. 176. So, if he accepts a grant of a thing conſiſtent with the leaſe of the land, it is no ſurrender: as if the leſſee of a manor accepts the grant of a bailiwick, or the ſtewardſhip of the ſame manor, for it is collateral: ſo if he accept the office of park-keeper of the ſame park for his life, that is no ſurrender, for the ſame reaſon.

Ibid. 84. But where leſſee for years of an advowſon was preſented to the advowſon by the leſſor, it was adjudged to be a ſurrender of his term.

Ibid. So, if a copyholder in fee take a leaſe for years of the ſame land, it is an extinguiſhment of his copyhold *in perpetuum:* but if he take a leaſe for years of the manor, that is but a ſuſpenſion of his copyhold during the term.

Ibid. 177. It is ſaid, that if a man hath lands in *A.* and other lands in *B.* and lets thoſe in *A.* for twenty-one years, and the next day lets all his lands in *B.* for ten years, it is not any ſurrender of the lands in *A.* but ſhall be conſtrued as a leaſe of all the other lands; which may well ſtand with the former leaſe.

So, if a leſſee take a grant of a rent-charge out of the ſame land for life, or if a leſſee for life take a grant of a rent-charge for years, that is not any ſurrender, becauſe he might have the benefit of that rent after the eſtate in the land is determined: but if a leſſee for life take a grant of a rent-charge for life out of the ſame land, that is a ſurrender, for otherwiſe the rent-charge cannot take any effect.

Com. Dig. *ut ante.* So, it is ſaid, if the leſſor grants a rent, common, *&c.* out of the land to his leſſee, without ſaying at what time it ſhall commence, it is no ſurrender; but it ſhall be intended after his term. [But *quære* this? for if the delivery of the deed conſtitute the commencement, as it does in all caſes where no date occurs or period is fixed, it ſeems it would be a ſurrender.]

Cro. Car. 197. So, if the king grant an office by patent, or make a demiſe for years, the acceptance of a new patent in the one caſe, or of a new leaſe in the other, is no ſurrender of the firſt grant.

Cro. Eliz. 688. A fine levied by a tenant for life to a reverſioner in fee, to

to the uſe of the conuſee and his heirs, and upon condition broken to the uſe of the conuſor for life, and one year over, is not a ſurrender.

No ſurrender, expreſs or implied, in order to or in conſideration of a new leaſe, will bind, if the new leaſe is abſolutely void; for the cauſe, ground, and condition of the ſurrender, fails: it is not indeed reaſonable in itſelf, nor can it be the intent of the parties, that an acceptance of a bad leaſe, ſhould be an implied ſurrender of a good one. 3 Bur. 1807. 4 Bur. 1982.

So if a ſurrender is intended for a particular purpoſe, and that purpoſe, (the only motive of it) fails; the ſurrender ought to fail too. *Ibid.*

If therefore the new leaſe does not paſs an intereſt according to the contract and intention of the parties, an acceptance of it is not an implied ſurrender of the old leaſe, Com. Dig. tit. Eſtates (G. 13.)

Leſſee for life made a leaſe for years, rendering rent, and after ſurrendered to the leſſor upon condition, then the leſſee for years takes a new leaſe for years of the leſſor, and after the leſſee for years performed the condition, and evicted the leſſee for years who re-entered, and the leſſee for life brought debt for the firſt rent reſerved; and it was ruled, that it was not maintainable, for the leaſe out of which it was reſerved is determined and gone; for though the ſurrender of the tenant for life, which made the leſſee for years immediate tenant to the firſt leſſor, and ſo enabled him to make ſuch ſurrender, was conditional, yet the defeaſance of the eſtate for life by performance of the condition cannot defeat the eſtate of the leſſee for years, which was abſolute and well made, and then the rent reſerved thereon is gone likewiſe. Bac. Abr. *ut ante.*

A leſſee may ſurrender upon condition, and if the condition be broken, the particular eſtate ſhall be reveſted. Co. Lit. 218, *b.*

Therefore, if leſſee for years ſurrender his whole term to the original leſſor upon condition, he may upon non-performance of the condition re-enter and revive the term. 2 Mod. 176.

If leſſee for years of lands accepts a new leaſe by indenture of part of the ſame lands, this is a ſurrender for that part only, and not for the whole, becauſe there is no inconſiſtency between the two leaſes for any more than that part only which is ſo doubly leaſed; and though a contract Bac. Abr. tit. Leaſes, (D. 3.)

for

for years cannot be ſo divided or ſevered, as to be avoided for part of the years, and to ſubſiſt for the reſidue, either by act of the party or act in law, yet the land itſelf may be divided or ſevered, and he may ſurrender one or two acres, either expreſsly or by act of law, and the leaſe for the reſidue will ſtand good and untouched.

Shep. Touch. 304. Cro. Eliz. 522, 605.

As to ſurrenders of leaſes *in future* or future intereſts, a leſſee for years of a term to begin at a day to come, cannot ſurrender it by an actual ſurrender before the day of the term begin. But he may by a ſurrender in law.

Shep. Touch, 302.

To make a good ſurrender in deed of lands, and to make them paſs by ſuch a ſurrender, theſe things are requiſite. 1. That the ſurrenderor be a perſon able to grant and make, and the ſurrenderee a perſon capable and able to take and receive a ſurrender, and that they both have ſuch eſtates as are capable of a ſurrender; and for this purpoſe, that the ſurrenderor have an eſtate in poſſeſſion of the thing ſurrendered at the time of the ſurrender made; and not a bare right thereunto only. 2. That the ſurrender be to him that hath the next immediate eſtate in remainder or reverſion, and that there be no intervenient eſtate coming between. 3. That there be a privity of eſtate between the ſurrenderor and ſurrenderee. 4. That the ſurrenderee have a higher and greater eſtate in the thing ſurrendered than the ſurrenderor hath, ſo that the eſtate of the ſurrenderor may be drowned therein. 5. That he have the eſtate in his own right, and not in the right of his wife, *&c.* 6. That he be ſole-ſeiſed of this eſtate in remainder or reverſion, and not in joint-tenancy.

Com. Dig. tit. Surrender (N.)

In reſpect to pleading a ſurrender, if a ſurrender be by acceptance of a new leaſe, it is not good to ſay, that the leſſee being poſſeſſed of a former leaſe, the leſſor demiſed to him; but that the leſſee ſurrendered and then the leſſor demiſed, or that the leſſor entered and demiſed.

So, regularly he ought to plead that he ſurrendered the eſtate and land; but if the party plead a ſurrender of a leaſe, it is ſufficient to ſay, "the demiſe aforeſaid."

Ibid.

So, regularly he ought to ſhew, that the leſſor aſſented to the ſurrender, where the other party pleads or brings an action in diſaffirmance of it; but it is not of neceſſity, and

and the omiſſion will be aided after verdict: and when it is pleaded that the leſſor agreed to the ſurrender, it ſhall be intended that he entered; and it is not uſual to plead a reentry upon a ſurrender, no more than when a feoffment is pleaded, to plead livery and ſeiſin thereof; becauſe it is admitted. Cro. Car. 101.

A ſurrender has in certain circumſtances been preſumed, where evidence of the fact was not to be had: indeed, the court will not require poſitive proof of a ſurrender in any caſe where there is ſufficient preſumption of it. 1 Bur. 1072.

But there muſt be preſumption of the ſurrender from ſome facts or circumſtances; for length of time alone is nothing: and though the Court in one caſe did lay it down that after a recovery of forty years ſtanding, they would without any other circumſtances, preſume a conditional ſurrender to have been made by the tenant for life, yet there were other circumſtances in the caſe to induce a ſuppoſition of a ſurrender having been made. So where poſſeſſion had not gone with the recovery, the Court would not preſume a ſurrender by the tenant for life.—Entry in an attorney's book was admitted in evidence on the ſubject. *Ibid.* 1075.

A ſurrender of a leaſe was preſumed in order to let in the ſtatute of limitations. *Ibid.* 126.

Concerning the renewal of leaſes, a conditional ſurrender of a prebend's leaſe was held good to warrant a renewal. *Of the Renewal of Leaſes.*

A. and *B.* covenant in a leaſe for ſixty-one years "that "at any time within one year after the expiration of "twenty years of the ſaid term of ſixty-one years, upon "the requeſt of the leſſee and his paying 6*l.* to the leſſors, "they would execute another leaſe of the premiſſes unto "the leſſee for and during the further term of twenty "years, to commence from and after the expiration of the "ſaid term of ſixty-one years, *&c.* and ſo, in like manner, at the end and expiration of every twenty years, "during the ſaid term of ſixty-one years, for the like "conſideration and upon the like requeſt, would execute "another leaſe for the further term of twenty years, *&c.* "to commence at and from the expiration of the term then "laſt before granted, *&c.*" Under this covenant, the leſſee cannot claim a further term at the end of the firſt and ſecond 2 Str. 1201. 1 T. R. 229.

ſecond twenty years in the leaſe; for this is an agreement on the part of the leſſors to grant a further leaſe on a precedent condition to be performed by the leſſee, which, in the principal caſe, he had not done.

9 Mod. 446. 3 Atk. 83. *ſ. c.* In what caſes covenants in a leaſe are underſtood to be covenants for a perpetual renewal or not, ſee the caſes referred to in the margin.

Cro. Eliz 479. Where a leſſor covenants that if a leſſee ſurrender at any time during the term, he will grant him a new leaſe, and then accepts a fine of the premiſſes; this is a breach of the condition, and in an action of debt on bond for the performance of covenants, the leſſee need not ſhew that he offered to ſurrender.

By the ſtatute 4 *G.* 2. *c.* 28. *ſ.* 6. which recites that "whereas many perſons hold conſiderable eſtates by leaſes "for lives or years, and leaſe out the ſame in parcels to "ſeveral under-tenants, and whereas many of thoſe leaſes "cannot by law be renewed without a ſurrender of all the "under-leaſes derived out of the ſame, ſo that it is in the "power of any ſuch under-tenants to prevent or delay the "renewing of the principal leaſe, by refuſing to ſurrender "their under-leaſes, notwithſtanding they have covenanted "ſo to do, to the great prejudice of their immediate land-"lords the firſt leſſees; for preventing ſuch inconveniences "and for making the renewal of leaſes more eaſy for the "future, it is enacted, that in caſe any leaſe ſhall be duly "ſurrendered in order to be renewed, and a new leaſe "made and executed by the chief landlord or landlords, "the ſame new leaſe ſhall, without a ſurrender of all or "any the under-leaſes, be as good and valid to all in-"tents and purpoſes as if all the under-leaſes derived "thereout had been likewiſe ſurrendered at or before the "taking of ſuch new leaſe; and every perſon, *&c.* in "whom any eſtate for life or lives, or for years, ſhall be "veſted by virtue of ſuch new leaſe, and his *&c.* executors "and adminiſtrators ſhall be intitled to the rents, cove-"nants, and duties, and have like remedy for recovery "thereof; and the under-leſſees ſhall hold and enjoy the "meſſuages, lands, and tenements, in the reſpective under-"leaſes compriſed, as if the original leaſes, out of which

"the

" the reſpective under-leaſes are derived, had been ſtill " kept on foot and continued; and the chief landlord and " landlords ſhall have the ſame remedy by diſtreſs and entry " upon the meſſuages, *&c.* for rents, *&c.* reſerved by ſuch " new leaſe, ſo as the ſame exceed not thoſe reſerved in the " leaſe out of which ſuch under-leaſe was derived, as they " would have had in caſe ſuch former leaſe had been ſtill " continued, or the under-leaſe had been renewed under " ſuch new principal leaſe."

A fourth means whereby a leaſe may be determined is by cancelling the deed by which it is granted. *4. Termination by cancelling the Deed.*

Whatever doubts may have been formerly entertained as to the effect of eraſing or otherwiſe cancelling a leaſe for years, now, ſince the ſtatute of Frauds and Perjuries, ſtat. 29 *C.* 2. *c.* 3. which makes all leaſes for above three years to have only the force and effect of leaſes at will, unleſs they be in writing, and ſigned by the party, *&c.* the deed or writing, whereby ſuch leaſe is made, ſeems to be of the ſame eſſence as the leaſe itſelf, and therefore the cancelling or deſtruction of that ſeems to deſtroy and avoid the leaſe itſelf, becauſe it deſtroys all evidence allowed by law for the ſupport thereof: though in ſuch caſe Chancery frequently ſets up the leaſe again, or decrees the party to execute a new one for the reſidue of the term; which is not againſt the prohibition of the act; becauſe there was once a good and effectual leaſe made purſuant to the ſtatute. Bac. Abr. tit. Leaſes (T.)

Though that ſtatute excepts leaſes not exceeding the term of three years, yet even theſe are not abſolutely excepted; for it goes on, " not exceeding the term of three " years from the making thereof, whereupon the rent re- " ſerved to the landlord during ſuch term ſhall amount " unto two third parts at leaſt of the full improved value " of the thing demiſed, and that no leaſes, eſtates, or in- " tereſts, either of freehold or terms for years, or any un- " certain intereſt, not being copyhold or cuſtomary intereſt " of, in, to, or out of any meſſuages, manors, lands, *&c.* " ſhall be aſſigned, granted, or ſurrendered, unleſs it be by " deed or note in writing ſigned by the party ſo aſſigning, " granting, or ſurrendering the ſame, or their agents there- " unto

" unto lawfully authorized by writing, or by act and ope-
" ration of law."

5. Termination by Condition indorſed. Cro. Jac. 456.

A leaſe may alſo be determined by force of a condition indorſed upon the back ſide thereof, if it be before the enſealing and delivery; as well as by force of a condition within the deed.

6. Termination by Forfeiture of the Leaſe. Bac. on Leaſes, 219.

The ſixth and laſt mode by which a demiſe may be determined is by forfeiture of his leaſe.

Any act of the leſſee, by which he diſaffirms or impunges the title of his leſſor, occaſions a forfeiture of his leaſe; for to every leaſe the law tacitly annexes a condition, that if the leſſee do any thing that may affect the intereſt of his leſſor, the leaſe ſhall be void, and the leſſor may re-enter: beſides, every ſuch act neceſſarily determines the relation of landlord and tenant; ſince to claim under another, and at the ſame time to controvert his title; to affect to hold under a leaſe, and at the ſame time to deſtroy that intereſt out of which the leaſe ariſes, would be the moſt palpable inconſiſtency.

Ibid. A leſſee may thus incur a forfeiture either by act *in pais*, or by matter of record. By matter of record: where he ſues out a writ or reſorts to a remedy which claims or ſuppoſes a right to the freehold; or where, in an action by his leſſor, grounded upon the leaſe, he reſiſts the demand under the grant of a higher intereſt in the land; or where he acknowledges the fee to be in a ſtranger; for having thus ſolemnly proteſted againſt the right of his leſſor, he is eſtopped by the record from claiming an intereſt under him.—By act *in pais:* as where he aliens the eſtate in fee, which however, (except the king be in remainder or reverſion, in which caſe a feoffment in fee will effect it,) muſt be by feoffment with livery; for that only operates upon the poſſeſſion, and effects a diſunion; it cannot be by grant, or any conveyance operating only on the grantor's intereſt, and paſſing only what he may lawfully depart with; nor, conſequently, can it be of things lying in grant: a leaſe by the tenant for more years than he has in the land is ſtill more venial; becauſe it is only a contract between him and his under-leſſee (or rather aſſignee) which cannot poſſibly prejudice

judice the intereſt of the original leſſor, and does not even pretend to uſurp or touch the freehold or inheritance.

A forfeiture is alſo incurred by the breach of expreſs or conventionary conditions: for the leſſor, having the *jus diſponendi*, may annex whatever conditions he pleaſes to his grant; provided they be not illegal, unreaſonable, or repugnant to the grant itſelf, and upon the breach of theſe conditions may avoid the leaſe. 2 T. R. 137. Cowp. 805.

Therefore, though it has been held that a leſſee might make a feoffment, and that notwithſtanding the preſence of the leſſor, for that the leſſee has the poſſeſſion and may diſpoſe of it, yet it was an extinguiſhment of the leaſe, and the leſſor might enter for the forfeiture. Cro. Eliz. 322.

So, where *A.* was entitled to a life eſtate ſubject to a condition not to charge or encumber it, granted an annuity and demiſed the land as a ſecurity; but as there was a defect in the memorial of the annuity, it was held that the deed was wholly void, and did not work a forfeiture of the eſtate. T. R. 641.

The law will always lean againſt forfeitures, as courts of equity relieve againſt them: and as courts adhere ſtrictly to the preciſe words of the condition in order to prevent a forfeiture; ſo, where a forfeiture has manifeſtly been committed, they will not allow the leſſor to take advantage of it, if they find that he has afterwards done any act that amounts to a waiver of it. Bull. N. P. 98. Bac. on Leaſes, 226.

In ejectment, therefore, by a landlord againſt his tenant on a proviſo for re-entry for a forfeiture, the whole Court held that the leſſor bringing covenant for half a year's rent ſubſequent to the time of the demiſe laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then ſubſiſted. Bull. N. P. 96.

But the forfeiture muſt be known to the leſſor at the time, in order to render his acceptance of rent or any other act a waiver; for it has been eſtabliſhed in many caſes, that acceptance of rent ſhall not operate as a waiver of the forfeiture, or as a confirmation of the tenancy, unleſs the landlord has notice that a forfeiture was incurred at the time. Cro. Car. 234. 2 T. R. 431. Cro. Eliz. 220.

So, when it is ſaid that a forfeiture may be waived, it muſt be underſtood to apply to thoſe caſes in which, by the

terms of the contract, the eſtate, upon the tenant doing or failing to do that which he has ſtipulated to abſtain from or to perform, is determinable, and not where it abſolutely determines: for, it is to be obſerved, that where the eſtate or leaſe is *ipſo facto* void by the condition or limitation, no acceptance of rent afterwards can make it to have a continuance, otherwiſe it is of an eſtate or leaſe voidable by entry.

Doug. 57 [29.]

He that would enter for a condition broken, which tends to the deſtruction of the eſtate muſt 1. Demand the rent. 2. Upon the land, if there be no houſe. 3. If there be a houſe, at the fore door of it: but it is not material whether any one be in the houſe or not. 4. If the appointment is at any other place off the land, the demand muſt be at that place. 5. The time of the demand is to be certain, that the tenant may be there, if he will, to pay the rent; and the laſt time of demanding the rent muſt be at ſuch a convenient time before ſun-ſet of the laſt day of payment, as that the money may be numbered.—The leſſor or his ſufficient attorney ſhould remain upon the land, the laſt day on which the rent due ought to be paid, until it be ſo dark that he cannot ſee to tell the money: and if the money thus demanded be not paid, this is a denial in law, though there are no words of denial; upon which a re-entry may be made.

1 Inſt. 201, 202. 4 Rep. 73.

By the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 16. which recites that "whereas landlords are often great ſufferers by tenants running away in arrear, and not only ſuffering the demiſed "premiſſes to lie uncultivated without any diſtreſs thereon, whereby their landlords or leſſors might be ſatisfied "for the rent-arrear, but alſo refuſing to deliver up the "poſſeſſion of the demiſed premiſſes, whereby the landlords are put to the expence and delay of recovering in "ejectment," it is enacted 'that if any tenant holding any 'lands, tenements, or hereditaments at a rack-rent, or 'where the rent reſerved ſhall be full three-fourths of the 'yearly value of the demiſed premiſſes, who ſhall be in arrear for one year's rent, ſhall deſert the demiſed premiſſes 'and leave the ſame uncultivated or unoccupied, ſo as no 'ſufficient diſtreſs can be had to countervail the arrears of 'rent, it ſhall be lawful for two or more juſtices of the

'peace

'peace of the county, riding, diviſion, or place (having no 'intereſt in the demiſed premiſſes) at the requeſt of the leſ-'ſor or landlord, leſſors or landlords, or his *&c.* bailiff or 'receiver, to go upon and view the ſame, and to affix or 'cauſe to be affixed on the moſt notorious part of the pre-'miſſes, notice in writing, what day (at the diſtance of 'fourteen days at leaſt) they will return to take a ſecond 'view thereof; and if upon ſuch ſecond view the tenant, 'or ſome perſon on his *&c.* behalf, ſhall not appear 'and pay the rent in arrear, or there ſhall not be ſufficient 'diſtreſs upon the premiſſes; then the ſaid juſtices may put 'the landlord, *&c.* into the poſſeſſion of the ſaid demiſed 'premiſſes, and the leaſe thereof to ſuch tenant, as to any 'demiſe therein contained only, ſhall from thenceforth be-'come void.'

Of Leaſes in reverſion. Doug. 568.

With reſpect to leaſes in reverſion, it is to be obſerved that "all leaſes where there is a particular eſtate out, are "leaſes in reverſion."

Thus if one lets a manor for thirty years, and the next day lets it to another for forty years to commence from *Michaelmas* next after the date; this paſſes a reverſionary intereſt: for the being for years is a chattel which may well expect or wait; and if I have a rent in fee I may grant it for years to commence at *Michaelmas*; for an eſtate doth not paſs but an intereſt.

Cro. Eliz. 287.

So, a huſband may make a leaſe of lands held in joint-tenancy with his wife, to commence after his death, and it will be good though the wife ſurvive: for the huſband having an intereſt to diſpoſe of in his life, he might diſpoſe of all the term, and it ſhould bind the wife; ſo when he hath diſpoſed by an act executed in his life of the intereſt of the term, and hath created a term in intereſt, this is as good as if he had granted all the term.

29 C. 2. c. 3.

As to the manner of making ſuch leaſes for years where there is a prior leaſe or eſtate then in being, they cannot be made by parol; for beſides that by the ſtatute of Frauds and Perjuries, no parol leaſe for above three years is to have any other effect than only as a leaſe at will, a deed is of the very

Bac. Abr. tit. Leaſes (N.)

eſſence of the grant of a reverſion, or reverſionary intereſt, and without it no reverſion or reverſionary intereſt can paſs out of the leſſor.—Such leaſes therefore muſt be made by either deed-poll, or indenture.

If one had made a leaſe for life, or for eighty years, if the leſſee ſhould ſo long live, and after by indenture let the ſame lands to another for years to begin preſently, and then the firſt leaſe determined by death, ſurrender, or forfeiture, the ſecond leſſee ſhould have the lands in poſſeſſion preſently for the reſidue of the years, becauſe ſuch ſecond leaſe, by reaſon of the eſtoppel, [for an indenture concludes all parties to it,] took effect between the parties preſently, and therefore ſhall come in poſſeſſion whenever the firſt leaſe is out of the way; but if ſuch ſecond leaſe had been only by deed-poll, there muſt have been an attornment to have made it good as a grant of the reverſion, as there muſt likewiſe in the other caſe, where it was made by indenture; and, without ſuch attornment the ſecond leaſe could only have taken effect in poſſeſſion upon the determination of the firſt leaſe by the death of the leſſee according to the expreſs limitation; and not upon any ſooner or other determination by ſurrender, forfeiture, or otherwiſe.

Of attornment.

Touching the ſubject of attornment, (which now exiſts ſcarcely in any caſe) it may be as well to obſerve, that after the ſtatute *quia emptores terrarum* was paſſed, by which ſubinfendation was prohibited, it became neceſſary that when the reverſioner or remainder-man after an eſtate for years, for life, or in tail, granted his reverſion or remainder, the particular tenant ſhould attorn, or conſent to pay his rent, *&c.* to the grantee. This neceſſity of attornment was in ſome degree diminiſhed by the ſtatute of Uſes, as by that ſtatute the poſſeſſion was immediately executed to the uſe; and by the ſtatute of Wills, by which the legal eſtate is immediately veſted in the deviſee; attornments however are now rendered almoſt unneceſſary in any caſe, by the ſtatute of *Anne*, which enacts, that all grants and conveyances of manors, lands, rents, reverſions, *&c.* by fine or otherwiſe, ſhall be good without the attornment of the tenants; but notice muſt be given of the grant to the tenant, before which

18 E. 1. St. 1.

27 H. 8. c. 10.

34 & 35 H. 8. c. 5.

4 Ann. c. 16. ſ. 9.

which he ſhall not be prejudiced by payment of any rent to the grantor, or of breach of the condition for non-payment. Alſo, by an act in the laſt reign, attornments of lands, *&c.* made by tenants to ſtrangers claiming title to the eſtate of their landlords ſhall be null and void, and their landlord's poſſeſſion not affected thereby: the ſtatute, however, does not extend to vacate any attornment made purſuant to a judgment at law, or with the conſent of the landlord; or to a mortgagee on a forfeited mortgage. 11 G. 2. c. 19.

If one makes a leaſe for life, and afterwards grants that the lands or reverſion ſhall remain to another for twenty-one years after the death of the tenant for life, theſe words are ſufficient to paſs a reverſionary intereſt by way of future leaſe, though there is not the word "demiſe," or any other word uſual or proper to deſcribe a leaſe for years by; for here, being words ſufficient to prove a preſent contract for the reverſionary intereſt of theſe lands, after the eſtate for life determined, theſe, in caſe of leaſe for years, which is but a contract, are in themſelves ſufficient, and adequate to any other form. Bac. Abr. tit. Leaſes (K.)

Of Eſtoppel.

Leaſes for years ſometimes enure by way of eſtoppel, which word ſignifies an impediment or bar to a man's invalidating his own ſolemn act.

Bac. Abr. tit. Leaſes (O.)

Therefore, if one makes a leaſe for years, by indenture, of lands wherein he hath nothing at the time of ſuch leaſe made, and afterwards purchaſes thoſe very lands, this ſhall make his leaſe as good and unavoidable as if he had been in the actual poſſeſſion and ſeiſin thereof at the time of ſuch leaſe made; becauſe he having by indenture expreſsly demiſed thoſe lands, is by his own act eſtopped and concluded to ſay that he did not demiſe them, and if he cannot aver that he did not demiſe them, then there is nothing to impeach the validity of the indenture, which expreſsly affirms that he did demiſe them, and conſequently the leſſee may take advantage thereof, whenever the leſſor comes to ſuch an eſtate in thoſe lands as is capable to ſuſtain and ſupport that leaſe.

1 Ld. Raym. 729.

But if it appear, by recitals in the leaſe, that he had nothing at the time of the demiſe, and afterwards he purchaſes the lands as aforeſaid, that will not enure by eſtoppel.

Bac. Abr. ut ante.

This eſtoppel by indenture is ſo mutual and reciprocal, that if a man takes a leaſe for years by indenture of his own lands, whereof he himſelf is in actual ſeiſin and poſſeſſion, this eſtops him during the term to ſay that the leſſor has nothing in the lands at the time of the leaſe made, but that he himſelf or ſuch other perſon was then in actual ſeiſin and poſſeſſion thereof; for by acceptance thereof by indenture, he is for the time as perfect a leſſee for years, as if the leſſor had at the time of making thereof the abſolute fee and inheritance in him. But if ſuch leſſee of his own lands, being ejected by the leſſor, ſhould bring an ejectment, and the leſſor ſhould plead not guilty, and give the leaſe and ſome matter of forfeiture thereof in evidence to ſupport his plea, without pleading, and relying on the eſtoppel, and the jury ſhould find the ſpecial matter, *viz.* that the defendant had nothing in the lands at the time of ſuch leaſe made, but that the plaintiff himſelf was then in actual ſeiſin and poſſeſſion thereof, whether the court, upon this verdict, are bound to adjudge according to the truth of the caſe, namely, that ſuch leaſe by one who had then nothing in the lands was void; or if they are to adjudge according to the law, working by way of eſtoppel upon ſuch leaſe by indenture, ſeems to be a doubt upon the books; but Lord *Coke* lays it down for a rule, that the jury do well to find the truth, *viz.* that the leſſor had then nothing in the land; but then upon ſuch finding, the court is to adjudge, according to the operation of law upon the eſtoppel wrought to both parties by the indenture, that they are bound: and this ſeems to be the better opinion.

Bull. N. P. 170. Salk. 277. *cited.*

Therefore in debt for rent upon an indenture, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, becauſe if he had pleaded it ſpecially, the plaintiff might have replied the indenture, and eſtopped him, or might demur, for the declaration being on the indenture, the eſtoppel appears on record. But if defendant plead *nihil habuit*, &c. and the plaintiff will not rely on the eſtoppel, but reply *habuit*, the jury ſhall find the truth.

Bac Abr. tit. Leaſes (O.)

But if ſuch leaſe for years were made by deed-poll of lands, wherein the leſſor had nothing, this would not eſtop the

the leſſee to aver that the leſſor had nothing in thoſe lands at the time of the leaſe made, becauſe the deed-poll is only the deed of the leſſor, and made in the firſt or third perſon; whereas the indenture is the deed of both parties, and both are, as it were, put in and ſhut up by the indenture. This however is where both parties ſeal and execute the indenture as they may and ought, for otherwiſe, if the leſſor only ſeals and executes it, the leſſee ſeems to be no more concluded than if the leaſe were by deed poll; for it is only the ſealing and delivery of the indenture as his deed that binds the leſſee, and not his being barely named therein, for ſo he is in the deed-poll; but that being only ſealed and delivered by the leſſor, can only bind him, and not the leſſee, who is not to ſeal and execute it; yet it ſhould ſeem that ſuch leaſe by deed-poll binds the leſſor himſelf as much as if it were by indenture, becauſe it is executed on his part with the very ſame ſolemnity, and therefore it ſhould ſeem he is bound by ſuch leaſe by way of eſtoppel.

Theſe eſtoppels ought to be mutual, otherwiſe neither party is bound by them; therefore, if a man take a leaſe for years of his own lands from an infant or feme-covert by indenture, this works no eſtoppel on either part, becauſe the infant or feme, by reaſon of their diſability to contract, are not eſtopped; therefore neither ſhall the leſſee be eſtopped. *Ibid.* Co. Lit. 352. *a.*

So, if a man take a leaſe for years of his own lands by patent from the king, rendering rent, this ſhall not eſtop the leſſee, as an indenture between common perſons in ſuch caſe would do, becauſe the king cannot be eſtopped; and if he be not eſtopped, neither ſhall the leſſee. Bac. Abr. *ad ante.*

If one lets lands to me by deed enrolled, unknown to me, and brings debt upon the leaſe, I may ſay *ne leſſa pas*, it ſeems; but he who made ſuch leaſe is concluded to ſay the contrary, which is in point to eſtabliſh that in caſe of a deed-poll (as this which is called a deed enrolled muſt be intended to be) the leſſor himſelf is eſtopped, though the leſſee be at large: and this cannot be intended an indenture, becauſe then the leſſee would have been eſtopped likewiſe, if he had ſealed it, which in this caſe it appears he did not, be-

cauſe it was unknown to him, and he therefore was not eſtopped, whether it were by indenture or deed-poll.

Co. Lit. 47. Cro. Eliz. 36. Theſe eſtoppels continue no longer on either part than during the leaſe; for as they began at firſt by making the leaſe, ſo by determination of the leaſe, they are at an end likewiſe; for then both parts of the indenture belong to the leſſor.

Co. Lit. 47. *b.* When an intereſt actually paſſes by the leaſe, there ſhall be no eſtoppel; though the intereſt purported to be granted be really greater than the leſſor at that time had power to grant: as if *A.* leſſee for the life of *B.* makes a leaſe for years by indenture, and after purchaſes the reverſion in fee, and then *B.* dieth, *A.* ſhall avoid his own leaſe, though ſeveral of the years expreſſed in it be ſtill to come; for he may confeſs and avoid the leaſe which took effect in point of intereſt, and determined by the death of *B.*

Ibid. If a man takes a leaſe for years of the herbage of his own land by indenture, this is no concluſion to ſay that the leſſor had nothing in the lands at the time of the leaſe made; becauſe it was not made of the lands themſelves.

Ibid. 45, *a.* Bac. Abr. tit. Leaſes (Q.) If *A.* ſeiſed of ten acres, and *B.* of other ten acres, join in a leaſe for years by indenture, there are ſeveral leaſes according to their ſeveral eſtates, and no eſtoppel is wrought by the indenture to either party, becauſe each has an eſtate whereout ſuch leaſe for years or intereſt may be derived; and the reaſon why eſtoppels are at any time allowed is, becauſe otherwiſe, when the party had nothing in the lands, the indenture muſt be abſolutely void, which would be hard to ſay, when the party hath under his hand and ſeal done all in his power to make it good; and ſince it can be good no otherwiſe, it ſhall be good by eſtoppel, rather than be abſolutely void; but when an intereſt paſſes from each leſſor, the indenture works upon ſuch intereſt to carry that, and therefore leaves no room for its operating by way of eſtoppel; but yet, ſince both equally joined in the leaſe, without diſtinguiſhing the ſeveral intereſts they had therein, the indenture works by way of confirmation, with reſpect to each from whom the whole intereſt did not paſs; that is *A.*'s confirmation for *B.*'s part, and *B.*'s confirmation for *A.*'s part.

So,

So, if two tenants in common of lands join in a leaſe for years by indenture of their ſeveral lands, this ſhall be the leaſe of each for their reſpective parts, and the croſs confirmation of each for the part of the other, and no eſtoppel on either part; becauſe an actual intereſt paſſes from each reſpectively, and excludes the neceſſity of an eſtoppel, which is never admitted, if by any conſtruction it can be avoided, as being one of thoſe things which the law looks upon as odious, becauſe it chokes and diſguiſes the truth. *Ibid.*

But if two joint-tenants for life or in fee, join in a leaſe for years by indenture, reſerving the rent to one of them only, this ſhall give him the rent excluſive of the other: and here the eſtoppel turns not upon the intereſt paſſed by the leaſe, for that is ſeveral according to their ſeveral rights as in the other caſes, which excludes any eſtoppel, but it turns upon the reſervation of the rent, which being made in this manner, to one excluſive of the other by indenture, works an eſtoppel againſt all the parties to ſay the contrary; and though the rent iſſues out of one part as well as the other, yet it not being part of the thing demiſed, but moving, as it were, rather by way of grant from the leſſee after the leaſe made, the leſſors are conſidered as accepting it in this manner by indenture, which concludes them as well as it doth the leſſee. *Ibid.*

But if the leaſe had been by parol or deed-poll, reſerving rent to the one joint-tenant only, this would not have excluded the other joint-tenant from an equal ſhare therein; becauſe this reſervation coming, as it were, by way of grant from the leſſee, and being only by parol or deed-poll, could not conclude the leſſors, who, with reſpect to the rent, were, as it were, grantees, and only paſſive; and the rent ſhall follow the reverſion in proportion to their ſeveral eſtates, and ſo let in both parties to an equal participation thereof. *Ibid.*

If two coparceners join in a leaſe for years, by indenture, of their ſeveral parts, this is ſaid in one book to be but as one leaſe; becauſe they have not ſeveral freeholds therein, but only one, as both making but one heir, and therefore ſhall join in an aſſiſe; but where in ejectment the plaintiff declared of a leaſe by two coparceners *quod demiſerunt*, exception Rac. Abr. tit. Leaſes (Q.)

exception being taken to it, the exception was allowed, becauſe the leaſe was ſeveral as to each coparcener for their own reſpective moiety; and this ſeems to be the better law, becauſe though they have but one freehold with regard to their anceſtor, and therefore if diſſeiſed, ſhall join in an aſſiſe, yet as to their diſpoſing power thereof they have ſeveral rights and intereſts, ſo that neither of them can leaſe or give away the whole.

Co. Lit. 45. *a.* But where the declaration in ejectment was of the joint-demiſe of *A.* and *B.* and on evidence it appeared that they were tenants in common, the plaintiff failed.

Co. Lit. 352. *a.* 1. As to eſtoppels, though the reaſon why they are allowed ſeems to be, that no man ought to allege any thing but the truth for his defence, and what he has alleged once is to be preſumed true, and therefore he ought not to contradict it, for *allegans contraria non eſt audiendus*; yet, eſtoppels in general are not to be favoured; they are to be extended only as far as poſitive rules have gone, becauſe the tendency of them is to prevent the inveſtigation of the truth of the caſe.

4. T. R. 254. 8 Mod. 313.

Of future Intereſts being barred. Bac. Abr. tit. Leaſes (P.) Reſpecting future intereſts, as to their being barred or deſtroyed, it has already appeared, that all leaſes for years at common law when they come *in eſſe*, are to be executed by the entry of the leſſee; but as to future intereſts, it has been clearly held, that if one make a leaſe to commence two years after, when the two years ſhall have expired, the leſſee before any entry may grant his term, although the leſſor continues in poſſeſſion, becauſe ſuch leſſee's *intereſſe termini* was not deveſted or turned to a right, but continued in him in the ſame manner as it was at firſt granted, and in the ſame manner he transfers it over to another, who by his entry may reduce it into poſſeſſion whenever he thinks fit.

Cro. Eliz. 157.

Bac. Abr. *ut ante.* Cro. Jac. 60. 3 Mod. 198. 1 Ld. Ray. 179. One made a leaſe for years, to begin after the end of a former leaſe for years then in being; the firſt leaſe determined, and before entry of the ſecond leſſee, he in reverſion entered and made a feoffment in fee, and levied a fine with proclamations, and five years paſſed without entry or claim of the ſecond leſſee; and if his term were barred? was the queſtion. It was adjudged, that by this fine and non-claim his term was barred, becauſe after the firſt leaſe expired, the

ſecond

ſecond leaſe was actually then come *in eſſe*, and reducible into poſſeſſion by an entry preſently, and then his not entering, which was his own fault and laches, could not ſtop the operation of the fine from running againſt him.

But if ſuch fine had been levied during the continuance of the firſt leaſe, it was agreed, that in ſuch caſe, the operation thereof ſhould not begin to run out againſt the ſecond leſſee till the firſt leaſe were determined, becauſe till then the ſecond leaſe was only an *intereſſe termini*, which the ſecond leſſee could not reduce into poſſeſſion by any entry till the firſt leaſe determined, and therefore was not obliged to take notice of the acts of ſtrangers, or of the ter-tenant in poſſeſſion; for if ſuch future intereſt might be deveſted before it came *in eſſe*, the leſſee or grantee thereof, having never entered, would have no means to reveſt it, and therefore till it comes *in eſſe*, the law takes care to ſecure it to the leſſee or grantee in the ſame manner as it was at firſt granted: but when the firſt leaſe is at an end, then the ſecond leſſee is to take care of it himſelf, and if he ſuffer five years to elapſe after that time without entry, or claim, this will bar ſuch intereſt, becauſe his right then commences in poſſeſſion, and from thenceforth the operation of the fine begins to run on againſt him. The caſe in *Noy* 129 has been denied by *Twiſden* to be law. Bac. Abr. *ante.*

As the leſſee muſt enter when his leaſe comes into poſſeſſion, ſo, if he enters before, it will be a diſſeiſin, and no continuance of poſſeſſion, though after the term actually begins will purge the diſſeiſin, or alter the eſtate of the leſſee. Cro Eliz. 769.

Yet debt lies for the rent in reſpect of the privity of contract upon the leaſe made. *Ibid.*

Where one declared of a leaſe 16 *April habendum* from the annunciation laſt paſt for ten years, "by virtue of "which he entered and had the tenements aforeſaid from "the ſaid annunciation;" this was held good, and that the leſſee was no diſſeiſor; for it ſhall be intended that he entered and occupied before by agreement; and a diverſity was taken between this caſe, where the commencement of the leaſe is limited from a time paſt, and that where it is limited *Ibid.* 903.

limited to begin at a time to come, in which caſe the entry of the leſſee before that period is a diſſeiſin.

Of Terms in truſt.

As to terms or leaſes for years in truſt to attend the inheritance, the relations of landlord and tenant are little if at all elucidated by a conſideration of them; but as they have occaſionally been mentioned in the courſe of the work, it may not perhaps be ſuperfluous ſhortly to notice them.

It has been held by the Court, that a fine levied in purſuance of a truſt cannot deſtroy any leaſe made by *ceſtui que truſt*; but though a fine by *ceſtui que truſt* does not deſtroy or extinguiſh the truſt, yet it is not ſafe to do it, by reaſon of the danger of not being able to prove an agreement to the contrary.

Upon trial of an iſſue out of Chancery, it was upon evidence agreed, that if one made a leaſe for an hundred years in truſt for himſelf and his wife, and afterwards they both join in levying a fine to a purchaſer for a valuable conſideration who had no notice of this leaſe in truſt, though the fine does not convey the term itſelf to the conuzee, the eſtate in law being in the truſtee, yet this deſtroys the truſt, ſo that the leaſe ſhall not hurt the purchaſer.

Of Leaſes by way of Mortgage.

Tenant for years may alſo be created by way of mortgage, the nature of which, notwithſtanding what we have ſaid before on the ſubject, we ſhall again briefly explain.

Bac. Abr. tit. Mortgage (A.)

As to mortgagees, then, by way of creating terms, this was formerly by way of demiſe and re-demiſe, as for example; *A.* borrowed money of *B.* whereupon *A.* would demiſe the land to *B.* for a term of 500, *&c.* years abſolutely, with common covenants againſt incumbrances and for farther aſſurance and then B. would, the day after, re-demiſe to *A.* for 499 years, with condition, to be void on non-payment of the money at the day to come. This manner of mortgaging came in after the 21 *H.* 8. *c.* 15. for falſifying recoveries, when a fixed intereſt was ſettled in terms for years: it was eſteemed beſt for the mortgagor, becauſe it avoided all manner of pretention from the incumbrances and dower of the feoffee in mortgage, and it was reputed beſt for the mortgagee, inaſmuch as it avoided the wardſhip and feudal duties of the tenure, and was only inconvenient in this—that if the ſecond

deed

deed were loſt, there appeared to be an abſolute term in the mortgage.

This is now the common method, *viz.* by a demiſe of the land for a term, under a condition to be void on the payment of the mortgage-money and intereſt; and a covenant is inſerted at the end of ſuch deeds, that till default ſhall be made in the payment of the money, the mortgagor ſhall receive the rents, iſſues, and profits, without account. *Ibid.*

This has been ruled to create a tenancy at will to the mortgagee; but if the mortgagor dies, the tenancy at will is determined, till there is a receipt of intereſt from the heir, which ſeems to make him alſo then tenant at will to the mortgagee. *Ibid.*

The laſt and beſt improvement however of mortgagees ſeems to be, that in the mortgage deed of a term for years, or the aſſignment thereof, the mortgagor ſhall covenant for himſelf and his heirs, that if default be made in the payment of the money at the day, then he and his heirs will, at the coſts of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to ſuch perſon or perſons (to prevent merger of the term) as he or they ſhall direct or appoint; for the reverſion, after the term of fifty or one hundred years, being little worth, and yet the mortgagee for want thereof continuing but a termor, and ſubject to forfeiture, *&c.* and not capable of the privileges of a freeholder; therefore, where the mortgagor cannot redeem the land, it is but reaſonable that the mortgagee ſhould have the whole intereſt and inheritance of it, to diſpoſe of as abſolute owner. *Ibid.*

A mortgage in the form of a leaſe was granted of a feme-covert's eſtate, by the huſband and wife. After the huſband's death, the deed being in the hands of the mortgagee, the widow had directed the tenants in poſſeſſion to attorn to the mortgagee, had ſettled with him for the balance of the rents, ſtyling him morgagee, and had not queſtioned his poſſeſſion for many years. In delivering the judgment of the Court, Lord *Mansfield* ſaid, that they were all of opinion that the conveyance in this caſe, though in the form of a leaſe, was in ſubſtance a mortgage, and not being within the reaſon for which leaſes by a feme-covert are held to be only Doug. 53. [27.]

only voidable, was abſolutely void on the death of the huſband: but that the acts done by the widow, the deed being in poſſeſſion of the mortgagee, were tantamount to a redelivery, which, without a re-execution, is equivalent to a new grant.

Ibid. 279. A mortgagee, after giving notice of the mortgage to the tenant in poſſeſſion under a leaſe prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues afterwards, and he may diſtrain for it after ſuch notice.

Ibid. 22. The legal intereſt of a mortgagor in poſſeſſion is inferior to that of a mere ſtrict tenant at will.

Bac. Abr. tit. Mortgage (C.) If a man mortgages his land, and, as is uſual, ſtill continues in poſſeſſion, and levies a fine, and five years paſs, yet the mortgage is not barred; for though the mortgagee be, in reality, out of poſſeſſion, yet when that is done by the conſent of both parties, and the nature of the contract requires that it ſhould be ſo while the intereſt is paid, it is againſt the original deſign of the contract that any act of the mortgagor, except the payment of the money, ſhould deprive the mortgagee of his ſecurity, and it is no leſs than a fraud, which of courſe the law will not countenance.

Doug. 22. Where the leaſe is not a beneficial leaſe, it is for the intereſt of the mortgagee to continue the tenant; and where it is, the tenant may put himſelf in the place of the mortgagor, and either redeem himſelf or get a friend to do it.

Bac. Abr. tit. Mortgage (D.) Upon a refuſal of the money by the mortgagor, a tender being made at the place and at ſome time of the day ſpecified in the condition, the condition is ſaved for ever, and the land is diſcharged, becauſe upon the tender the demiſe is void.

Com. Dig. tit. Surrender (L. 1.) If one mortgage his reverſion in fee to the leſſee for years, whereby his term is ſurrendered, and afterwards pays the money purſuant to the condition, yet his term ſhall be extinguiſhed and not revived.

By ſtat. 4. *William* and *Mary* *c.* 16. *ſ.* 3. it is enacted, that if any perſon who has once mortgaged any lands or tenements to another, ſhall again mortgage the ſame or any part thereof to a ſecond mortgagee, the former mortgage being in force and not diſcharged, and ſhall not diſcover to ſuch

ſuch ſecond mortgagee the former mortgage in writing under their hand, that then ſuch mortgagor, his heirs, *&c.* ſhall have no relief or equity of redemption againſt the ſaid ſecond mortgagee; but ſuch ſecond mortgagee, his heirs, *&c.* may hold and enjoy ſuch more than once mortgaged lands and tenements for ſuch eſtate or term as was granted or conveyed by the ſaid mortgagor againſt him, his heirs, *&c.* freed from equity of redemption, and as fully to all intents and purpoſes as if the ſame had been an abſolute purchaſe, and without any power or liberty of redemption.—Under mortgagees may redeem by ſection 7 of the act.

CHAPTER

CHAPTER VII.

For what Term Leaſes may be made.

SECTION I. *Of Tenants from Year to Year.*

SECTION II. *Of Tenants for a leſs Term (monthly, weekly, &c.)*

SECTION III. *Of ſtrict Tenants at Will.*

SECTION IV. *Of Tenants at Sufferance.*

SECTION I. *Of Tenants from Year to Year, wherein of notices to quit.*

8 T. R. 3. 3 T. R. 16. THAT which was formerly conſidered as a tenancy at will has been ſince properly conſtrued to enure as a tenancy from year to year; which therefore may now be ſaid to be when a man lets lands or tenements to another without limiting any certain or determinate eſtate; eſpecially if an annual rent be reſerved.

Com. Dig. tit. Eſtates (H. 1.)

2 Bl. R. 1171. A general parol demiſe therefore at an annual rent, where the bulk of the farm is encloſed and a ſmall part of it in the open common fields, is only a leaſe from year to year; and not for ſuch time as the round of huſbandry continues.

Ibid. But where the crop, as of liquorice, madder, &c. does not come to perfection in leſs than two years, it might be otherwiſe.

2 Bl. R. 1225. 3 T. R. 27. In tenancies from year to year, therefore, there muſt be ſix months notice on either ſide to quit, according to the antient law; except where any ſpecial agreement, or the cuſtom of particular places, intervene.

Eſp. R. 266. Where rent is reſerved quarterly, it does not diſpenſe with the regular ſix month's notice to quit required by law; but is merely a collateral matter.

So, though a leaſe be void by the ſtatute of Frauds as to the duration of the term, the tenant holds under the terms of the leaſe in other reſpects; and therefore the landlord can only put an end to the tenancy at the expiration of the year. 5 T. R. 471.

When a leaſe is determinable on a certain event, or at a particular period, no notice to quit is neceſſary, becauſe both parties are equally apprized of the determination of the term. 1 T. R. 54, 162.

If there be a leaſe for a year, and by conſent of both parties the tenant continue in poſſeſſion afterwards, the law implies a tacit renovation of the contract; for where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms: they are therefore ſuppoſed to have renewed the old agreement, which was to hold for a year. But then it is neceſſary, for the ſake of convenience, that if either party ſhould be inclined to change his mind, he ſhould give the other half a year's notice before the expiration of the next or any following year. *Ibid.* 166. 1 T. R. 572.

So, where tenant for life grants a leaſe for years which is void againſt the remainder-man, and the latter, before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created, yet this is with reference to the old term, and therefore a half year's notice to quit from the remainder-man ending with the old year is good. 7 T. R. 478.

So, where tenant for life makes a leaſe for years, to commence on a certain day, and dies before the expiration of the leaſe, in the middle of the year; the remainder-man receives rent from the leſſee, (who continues in poſſeſſion, but not under a freſh leaſe) for two years together on the days of payment mentioned in the leaſe: this was held to be evidence from which an agreement will be preſumed to ſubſiſt between the remainder-man and the leſſee, that the leſſee ſhould continue to hold from the day, and according to the terms, of the leaſe; ſo that notice to quit ending on that day is proper. 1 H. Bl. R. 97.

The "ſix months" notice means half a year; and not merely the ſpace of ſix months at any time of the year: for *Ibid.* 3 Wilſ 25. 2 Salk. 413. 1 Eſp. R. 266.

for ſuch half year's notice muſt expire at the end of the year, or it will not be a good notice.

2 Bl. R. 1224. An agreement therefore to take a farm, the arable from old *Candlemas*, the paſture from old *Lady-day*, and the meadow from old *May-day*, paying rent half-yearly at old *Michaelmas* and *Lady-day*, is ſubſtantially a taking of the whole from old *Lady-day*, and notice to quit delivered before old *Michaelmas*, is ſufficient to determine the tenancy.

1 T. R. 161. For this reaſon it has been held, that a notice to quit at *Lady-day* was *primâ facie* evidence of a holding from *Lady-day* to *Lady-day*, till the contrary was ſhewn.

Ibid. So, where the leſſor of the plaintiff in an ejectment could not prove the time when the term commenced, and the tenant proved it to be different from the time to quit mentioned in the notice, the plaintiff was non-ſuited.

Eſp. N. P. 460. But notwithſtanding, where the notice was given on the 30th of *September*, being the day after *Michaelmas-day*, to quit at *Lady-day* following, Mr. J. *Heath* ruled the notice ſufficient: this was probably on the principle of its being reaſonable notice; and what is reaſonable is matter of circumſtance.

2 Bl. R. 535; Eſp. N. P. 461. So, it is ſaid to have been ruled at *Niſi Prius*, that where notice to quit has been ſerved on the tenant, and the landlord being ignorant of the time when the tenancy commenced, has given the notice to quit at the wrong time, that is, not at the end of the year, that the tenant when the notice is ſerved ought to inform the landlord of his error and mention the true time.

4 T. R. 360. The rule however is otherwiſe; for if notice to quit at *Midſummer* be given to a tenant holding from *Michaelmas*, he may inſiſt on the inſufficiency of the notice at the trial of an ejectment, though he did not make any objection at the time that it was ſerved; but ſaid "I pay rent enough al-"ready, and it is hard to uſe me thus;" for the expreſſion is merely that of an angry man.

1 Bl. R. 596. It once was doubted, whether if the landlord or tenant died, the ſame notice to his executors or adminiſtrators was neceſſary as would have been requiſite had he lived; and it was even ſuggeſted that a month's notice in ſuch caſe would ſuffice.

It

It is now ſettled, however, that in the caſe of a tenancy from year to year as long as both parties pleaſe, if the tenant die inteſtate, his adminiſtrator has the ſame intereſt in the land which his inteſtate had; for ſuch tenancy is a chattel intereſt, and whatever chattel the inteſtate had muſt veſt in his adminiſtrator as his legal repreſentative. 3 T. R. 16.

Therefore half a year's notice to quit muſt be given to a tenant at will (that is to ſay a yearly tenant) or his executor, or an ejectment will not lie. 3 Wilſ. 25.

So in the caſe of an infant: therefore, where an infant becomes entitled to the reverſion of an eſtate leaſed from year to year, he cannot eject the tenant without giving the ſame notice as the original leſſor muſt have given. 2 T. R. 159.

So alſo, tenant from year to year before a mortgage or grant of the reverſion, is entitled to ſix month's notice to quit before the end of the year from the mortgagee or grantee. 1 T. R. 380.

If a tenant hold under an agreement for a leaſe at a yearly rent, whereby it is ſtipulated that the agreement ſhall continue for the life of the leſſor, and that a clauſe ſhall be inſerted in the leaſe, giving the leſſor's ſon power to take the houſe for himſelf when he came of age, the ſon muſt make his election in a reaſonable time, as for example, a week or fortnight, after he comes of age: the delay of a year is unreaſonable, and the tenant cannot be ejected upon half a year's notice to quit ſerved after ſuch a delay. 2 T. R. 436.

There is no diſtinction in reaſon between houſes and lands, as to the time of giving notice to quit: it is neceſſary that both ſhould be governed by one rule. There may be caſes where the hardſhip would be felt in determining that the rule did not extend to houſes as well as lands: as in the caſe of a lodging-houſe in *London* being let to a tenant at *Lady-day* to hold from year to year; if the landlord ſhould give notice to quit at *Michaelmas*, he would by that means deprive the leſſee of the moſt beneficial part of the term, ſince it is notorious that the winter is by far the moſt profitable ſeaſon of the year for thoſe who let lodgings. The notice ſhould be half a year preceding the expiration of the year. 1 T. R. 162.

Therefore, where a tenant held from the 22d of *Novem-* 1 T. R. 382.

ber as a yearly tenant; and a mortgagee who became ſuch in *July* was deſirous of ouſting him, it was too late to give notice then for the tenant to quit at the end of the current year; for the tenant, at the time that the mortgagee's title accrued, had as permanent an intereſt in the eſtate till the 22d of *November*, as if it had been leaſed to him by deed till that period.

1 T. R. 163. 13 H. 8. 15. b. The doctrine reſpecting notice to quit was laid down as early as in the reign of *Henry* VIII. Touching the diſtinction between ſix months and half a year, the caſe in the year books requires half a year's notice.

1 Eſp. R. 94. A notice to quit has reference, in all caſes, to the letting: therefore, where a houſe was taken by the month, it was held that a month's notice was ſufficient to entitle the plaintiff to recover.

3 Bur. 1609. Though reaſonable notice muſt be given before the end of the year by landlord or tenant, and ſuch notice is generally required to be half a year's, yet it varies according to the cuſtom of different countries.

2 Bl. R. 1224. Therefore, where the arable part of a farm was to be entered on, and quitted on the 13th of *February*, it was conſidered to be no more than the cuſtom of moſt countries would have directed without any ſpecial words, on a taking from *Lady-day* to *Lady-day*; that being the time when the land is to be prepared for lent-corn; and as the tenant outgoing has the benefit of the way-going crop, any inconvenience to him is obviated; whereas great miſchief might happen to landlords if compelled to give notice ſo early as *Auguſt*, as it would enable the tenant to harraſs the land.

Peake's Ca. N. P. 5. So by ſpecial cuſtom, three months notice, or twelve months, will be the proper notice.

1 Skin. 649. As by the cuſtom of *London*, where a tenant under the yearly rent of 40 *s.* is entitled to a quarter's notice to quit; but a tenant above that rent muſt have half a year's notice.

1 Eſp. R. 266. The cuſtom of the country is alſo admiſſible evidence to explain the nature of the holding, as whether a general holding from *Michaelmas* means old or new *Michaelmas*.

3 Bur. 1609. 1 Bl. R. 533. A parol notice, it ſhould ſeem, would be ſufficient under a parol demiſe.

In other cases, however, notice to quit should be in writing.

Such notice should be clear and certain in its terms, and not ambiguous or optional.

Therefore if a notice to quit be in these words, "I de- Doug. 176, "sire you to quit, or else that you agree to pay double "rent" the tenant having an option, the notice would not be sufficient.

But where notice in writing was served on a tenant and *Ibid.* was in the following words, "I desire you to quit possession "on *Lady-day* next, or I shall insist upon double rent;" the Court held it to be sufficiently positive, and that the latter words were added only by way of threat of the consequence of holding over the possession.

The delivery of the notice to quit to the servant of the 4 T. R. 464. tenant at his dwelling-house, to whom the nature of it was explained, though such dwelling-house was not situated on the premisses and it did not appear to have come to the tenant's hands, is strong presumptive evidence that it reached him; which may be rebutted by the evidence of the servant.

If a landlord receive rent due, after the expiration of a 6 T. R. 220, notice to quit, it is a waiver of that notice. But if the 1 H. Bl. R. 312. money had not been received as rent, but as a satisfaction for the injury done by the tenant in continuing on his late landlord's premisses as a trespasser, then the late landlord might have recovered in ejectment.

But though notice to quit is in general waived by the re- Covp. 145. ceipt of rent due subsequent to such notice, yet the mere acceptance of rent by a landlord subsequent to the time when the tenant ought to have quitted according to the notice given him for that purpose is not itself a waiver on the part of the landlord of such notice; but matter of evidence only to be left to the jury, under the circumstances of the case; for the landlord might possibly have accepted the rent under terms, or made an express declaration that he did not mean to waive the notice, and that notwithstanding his acceptance or receipt of the rent, he should still insist upon the possession; or fraud or contrivance might have been practised on the part of the tenant in paying it.—The question

therefore, in ſuch caſes is, *quo animo* the rent was received, and what the real intention of both parties was?

1 T. R. 53. So, if a landlord gives notice to his tenant to quit at the expiration of the leaſe, and the tenant hold over, the landlord is entitled to double rent; and a ſecond notice delivered to the tenant after the expiration of ſuch notice "to quit "on a ſubſequent day or to pay double rent;" is no waiver of the firſt notice, or of the double rent which has accrued under it.

Ibid. 161. So, where one in remainder, after the expiration of an eſtate for life gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent; ſuch acceptance being only evidence of a holding from year to year, is rebutted by the previous notice to quit, and therefore the notice remains good.

Eſp. R. 266. But when three months notice was given where the rent was reſerved quarterly, and the landlord expreſſed neither his aſſent nor diſſent to admit it, and took the rent up to the time when his tenant quitted; it was conſtrued to be ſuch an acquieſcence as amounted to preſumptive evidence that the parties intended to diſpenſe with the notice, and was therefore deemed a waiver of it.

4 Eſp. R. 505. If at the end of the year (where there has been a tenancy from year to year) the landlord accepts another as his tenant, without any ſurrender in writing, ſuch acceptance ſhall be a diſpenſation of the notice to quit.

Bull N. P. 96. Cowp. 622. Eſp. N. P. 463. Notice however is not neceſſary in every caſe; for if the tenant have attorned to ſome other perſon, or done ſome other act diſclaiming to hold as tenant to the landlord, in

Peake's Ca. N. P. 197. that caſe no notice is neceſſary. Indeed if a tenant put his landlord at defiance, his landlord may conſider him either as his tenant or a treſpaſſer, and in the latter caſe need not give him a notice to quit before he brings his ejectment.

Ibid. But a refuſal to pay rent to a deviſee in a will which was conteſted is not ſuch a diſavowal of the title as to empower ſuch deviſee to maintain an ejectment without giving a previous notice.

2 Eſp. R. 530. So, where an ejectment has been brought on the demiſe of an infant, which has been compromiſed, and the tenant in poſſeſſion has attorned to the infant: though the leſſor of the

the plaintiff on coming of age, does not accept rent or do any other act to confirm the tenancy, yet as the former ejectment was brought at his suit and for his benefit, he shall not be allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit.

A mortgagee may recover possession against the mortgagor, or a tenant under a lease from the mortgagor posterior to the mortgage, without notice to quit; for when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premisses at will in the strictest sense, and therefore no notice is ever given him to quit. Doug. 22.

So, a mortgagee need not give notice to a tenant to quit, before bringing his ejectment, if he mean only to get into the receipt of the rents and profits of the estate, though the mortgage be made subsequent to the tenant's lease. But in such case he shall not be suffered to turn the tenant out of possession by the execution. In the present case the lease was only from year to year, and with respect to the last year, might be considered as a lease subsequent to the mortgage; but the Court held that it would have been the same if the lease were for a long term. Bull. N. P. 96.

Wherever the lessee holds under a void demise, no notice it seems is necessary; as in the case just mentioned of a lease by a mortgagor after the mortgage. Esp. N. P. 463.

So, where in ejectment for lands in *Surry*, the case was that *Elizabeth Compton* being entitled to a copyhold of inheritance held of the manor of *Kennington*, was admitted to it in 1767; in 1780 Mr. *C.* her husband granted a lease to *M.* for forty years, (under whom the defendant claimed) without the consent or the joining of his wife, and therefore contrary to stat. 32 *H.* 8. *c.* 28. *s.* 3. in 1782, Mrs. *C.* died, leaving her husband and an only daughter (now the lessor of the plaintiff) her heir at law; Mr. *C.* received the rent till the time of his death in 1788, and Mrs. *A.* the lessor of the plaintiff, also received it after his death, as reserved by the lease, till 1789; when on discovery that the lease was void under stat. 32 *H.* 8. and also not warranted by the custom of the manor, the present ejectment was brought without giving notice to quit. For the defendant, it was *Ibid.* 464.

Doug. 53. n. [17.] 54. n. inſiſted that the leaſe was good, or at moſt only voidable, and confirmed by acceptance of rent by Mrs. *A.* the plaintiff; but that even if ſhe had not confirmed the leaſe, ſhe had made the holding a tenancy from year to year, and therefore ſhould have given notice to quit; but both points were over-ruled by the Judge, and the plaintiff recovered.

Co. Lit. 215. It is to be obſerved, that where the eſtate or leaſe is *ipſo facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance; otherwiſe

Ibid. n. 1. it is of an eſtate or leaſe voidable by entry: and this diſtinction is, becauſe the acceptance of rent in the one caſe cannot make a new leaſe, and the old one was determined; but the acceptance of the rent in the other, is a ſufficient declaration that it is the leſſor's will to continue the leaſe, for he is not entitled to the rent but by the leaſe.

7 T. R. 83. If a tenant for life, under a limited power of leaſing, grant a leaſe exceeding his power, the leaſe is void, and not capable of confirmation: but if the remainder-man accept rent, as rent, after the death of tenant for life, it is an admiſſion that the defendant is his tenant, and ſuch tenant is entitled to notice to quit.

Ibid. 64. A notice delivered to a tenant at *Michaelmas* 1795, to quit at "*Lady-day* which will be in the year 1795," was holden to be good notice to quit at *Lady-day* 1796; for the intention was clear, and 1795 ſhall be rejected therefore as an impoſſible year.

SECTION II. *Of Tenants for a leſs Term than from Year to Year.*

We have had occaſion before to obſerve, that any one poſſeſſed of a certain quantity of intereſt may alienate the whole or any part of it, unleſs reſtricted from ſo doing by agreement with the party from whom he derives that intereſt or eſtate, or by the terms upon which he takes it.

Upon the ſame principle he may demiſe it or any part of it for any term ſhorter than that of which he is poſſeſſed; and when part of a meſſuage or tenement is let to another, it is called a lodging, or lodgings.

Lodgings may be let in the ſame manner as lands and tenements: in general however they are let either by agree-

ment

ment in writing between the landlord and tenant, or by parol agreement.

With reſpect to the general rule that in the caſe of a yearly tenancy, notice to quit muſt be half a year before the expiration of the year; the caſe of lodgings depends upon a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or leſs time, and there much ſhorter notice would be ſufficient where the tenant has held over the time agreed upon, than in the other caſe. 1 T.R. 162.

The whole queſtion depends upon the nature of the firſt contract: ſo that if the parties have agreed that the tenant ſhall hold for a term certain, no notice of courſe can be neceſſary; but if the tenant hold for no particular period, reaſonable notice muſt be given, which is regulated generally, if not always, by the local cuſtom of the particular place or diſtrict, which for the moſt part requires the ſame ſpace of time for notice as the period for which the lodgings are taken, as a week's notice, where taken for a week, a month's where taken for a month, and ſo forth; but this is not always the caſe, for it is not always neceſſary (it is preſumed) that a quarter's notice ſhould be given where the rent is paid quarterly, and it is underſtood to be a quarterly taking, for a month's notice is ſometimes cuſtomary, and probably a court and jury would think generally reaſonable. *Ibid.* 1 Eſp. R. 94.

If a houſe, originally entire, be divided into ſeveral apartments, with an outer door to each apartment, and no communication with each other ſubſiſts, in ſuch caſe the ſeveral apartments are conſidered in law as diſtinct manſion-houſes. 6 Mod. 214.

But if the owner live in the houſe, all the untenanted apartments ſhall be conſidered as parts of his houſe. *Ibid.*

Yet, if there be two ſeveral tenements originally and they become inhabited by ſeveral families, who make but one avenue for both, and uſe it promiſcuouſly, the original ſeverality is ſo far recognized and regarded, that they continue to be ſeverally rateable to the poor. *Ibid.*

Theſe lodgings conſtitute ſuch an intereſt according to the duration of the term, that to many purpoſes the lodgers are conſidered in law in the light of houſeholders and enjoy the

the ſame protection, and greater immunities, for they are not compellable to ſerve pariſh offices.

1 Haw. P. C. 164. ſ. 15. Therefore, if one hire a part of a houſe to lodge in, which is actually divided from the reſt, and have a door of his own to the ſtreet, a burglary committed therein may be

Ibid. n. b. alledged *in domo manſionali* of ſuch perſon; and even if the owner occupy a ſhop or cellar in the houſe, unleſs he ſleep therein, it is the manſion of each lodger, although there be but one outer-door: but it is otherwiſe, if the owner ſleep therein.

Ibid. 163. A houſe, in fact, wherein a man dwells for only part of the year; or which he has actually hired, but not moved into; or a chamber in an inn of court; or a houſe hired by a man's wife, for her ſeparate reſidence without his knowledge, for it is the huſband's houſe; are all of them ſufficient to ſatisfy the words *domus manſionalis*.

Ibid. 164. ſ. 16. But if the perſon had taken an apartment as a ſhop or work-houſe, for his uſe in the day time only, it ſeems that a felony therein cannot be alledged to have been committed in a manſion houſe: not of him that lets it, becauſe it is ſevered by the leaſe from that part of the houſe which belongs to him; nor of him to whom it is let, becauſe he

Ibid. n. c. takes it not to lodge in. But if he ſleep in any part of the building, however diſtant from the ſhop, it may be alledged to be his manſion-houſe; provided the owner does not ſleep under the ſame roof alſo.

Ibid. 161. ſ. 5. If with intent to rob a houſe, a perſon takes lodgings in it, and then fall on the landlord and rob him, ſuch perſon is guilty of burglary.

2 Haw. P. C. 500. ſ. 97. Cro. Car. 473. As to the ſtat. 39 *Eliz. c.* 15. making it a capital felony to commit a larceny of goods to the value of 5 *s.* in a dwelling houſe in the day time, it ſeems agreed that a chamber in one of the inns of court wherein a perſon uſually lodges, is properly a dwelling-houſe within the ſtatute: but a lodging in *Whitehall* or *Somerſet-houſe* is not.

Cowp. 1. But this privilege of a lodger's tenement being regarded as his manſion-houſe extends only to the purpoſes of protection to a man and his family, and is to be taken ſtrictly. A bailiff, therefore, in the execution of meſne proceſs, may break open the door of a lodger, having firſt gained peaceable

peaceable entrance at the outer door of the houſe: for the rule, that every man's houſe is his caſtle, muſt be confined to the breach of windows and of outer doors intended for the ſecurity of the houſe againſt perſons from without endeavouring to break in. Foſt. C. L. tit. Homicide, c. 3. s. 20.

For the protection of landlords againſt a ſpecies of pillage to which perſons letting ready furniſhed lodgings are much expoſed, as it was doubted at common law, whether the taking things in a lodging room was more than a breach of truſt, becauſe of their being lent to a perſon and lawfully in their poſſeſſion, therefore the taking away from ſuch lodgings, with an intent to ſteal, embezzle, or purloin any chattel, bedding, or furniture, which by contract or agreement they are to uſe, or ſhall be let to them with the ſaid lodgings, is made larceny and felony.—A man and his wife cannot both be guilty of the ſame larceny in robbing their lodgings; for if they both had committed it together, the woman muſt be acquitted, for ſhe is under his coercion. If the lodgings be let jointly, it is the taking of the huſband only. Stat. 3 W. & M. c. 9. s. 5. 1 Haw. P. C. 137. n. 3.

In reſpect to letting houſes, though, as has been before obſerved, there is no diſtinction in reaſon between houſes and land, as to the time of giving notice to quit in yearly tenancies, it being neceſſary that both ſhould be governed by one rule; and that where rent is reſerved quarterly, it does not diſpenſe with the regular ſix month's notice to quit required by law, but is merely a collateral matter; yet in the caſe of a houſe being let for a ſhorter term than a year, the holding aſſimilates itſelf to that of a lodging: therefore where a houſe was taken by the month, it was held that a month's notice was ſufficient; for a notice to quit has reference in all caſes to the letting. 1 T. R. 162. Eſp. R. 266. *Ibid.* 94.

If the lodgings be furniſhed, it may be as well to have a ſchedule of the goods they contain affixed to the agreement, if there be one in writing; in the ſame manner as in the caſe of a leaſe of a houſe with goods. *Vide ante*, p. 116.

Section III. *Of ſtrict Tenants at Will.*

Although courts of law have of late years leaned as much as poſſible againſt conſtruing demiſes, where no certain 2 Bl. Com. 143.

term

term is mentioned, to be tenancies at will, but (as we have juſt ſeen) have rather held them to be tenancies from year to year ſo long as both parties pleaſe, eſpecially where an annual rent is reſerved; and although it is ſaid, that in the country, leaſes at will in the ſtrict legal notion of a leaſe at will, being found extremely inconvenient, exiſt only notionally, the obſervation, Mr. *Hargrave* thinks, means, not that eſtates at will may not ariſe now as well as formerly, but only that it is no longer uſual to create ſuch eſtates by expreſs words, and that the Judges incline ſtrongly againſt implying them.

9 Bur. 1609.

Co. Lit. 55.

Bil. Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the leſſor, by force of which leaſe the leſſee is in poſſeſſion. In this caſe, the leſſee is called tenant at will, becauſe he hath no certain nor ſure eſtate, for the leſſor may put him out at what time it pleaſeth him. But every leaſe at will muſt be at the will of both parties.

2 Salk. 436. If a termor grants the land generally, the grantee is but tenant at will; for it does not appear that the grantor meant to paſs his whole intereſt, and this is enough to ſatisfy the grant.—But if a termor deviſes the land, all his term paſſes; for the deviſee cannot be tenant at will, becauſe the deviſor muſt die before the deviſe can take effect; and one cannot be tenant at will to a dead man.

Co. Lit. 55. *a.* If one leaſe for years, with a proviſo, that leſſor may enter at his will, it is a leaſe at will.

So, if one demiſes a tenement to another excepting the new houſe for his habitation, when he pleaſes to ſtay there, and at other times for the uſe of the leſſee; the leſſee has the new houſe as tenant at will.

4 Mod. 9.

3 Salk. 223. So, if one give to another licence to take the profits of his land without mentioning for how long a period or reſerving an annual rent, it ſhall be a leaſe at will.

1 Wilſ. 176. A man who enters and enjoys under a void leaſe, and pays rent, is a tenant at will, and not a diſſeiſor.

Com. Dig. tit. Eſtates (H. 2.) But if a man enter by colour of a grant or conveyance, which was void and did not ſtand with the rule of law; he ſhall be diſſeiſor, and not a tenant at will.

A mortgagor

A mortgagor is in ſome reſpects ſtrictly tenant at will, and in many caſes is like a tenant at will. 1 T. R. 382.

Therefore if a mortgagee covenants that the mortgagor ſhall take the profits till default of payment; or that the mortgagor and his heirs ſhall take the profits; in the one caſe, the mortgagor, and in the other his heir after his death, ſhall be tenant at will. Com. Dig. *ut ante* (H. 1.) Cro. Jac. 660.

But if mortgagee covenants that he will not take the profits till default of payment, and the mortgagor enters immediately; he ſhall not be tenant at will, but only at ſufferance; for it was not agreed that he ſhould take, but that the mortgagee ſhould not take. Com. Dig. tit. Eſtates (H. 2.)

A mortgagor however is not properly a tenant at will to the mortgagee, for he is not to pay him rent: he is indeed as much if not more like a receiver than a tenant at will; though in truth he is not either. He is only a tenant at will, becauſe he is not entitled to the growing crops after the will is determined; for the mortgagee may bring his ejectment at any moment that he will; and he is entitled to the eſtate as it is with all the crops growing on it. Dougl. 282, 3. 1 T. R. 383.

If tenant for years continues after his term, and his rent is paid and accepted as before, it is ſaid that he ſhall be tenant at will; but that while he ſo continues, till his rent is paid and accepted he is tenant at ſufferance or rather at will. Com. Dig. tit. Eſtates (H. 1. and I. 1.)

For if a tenant whoſe leaſe is expired is permitted to continue in poſſeſſion, pending a treaty for a further leaſe, he is not a tenant from year to year, but ſo ſtrictly at will, that he may be turned out of poſſeſſion without notice. 2 Eſp. R. 717.

A leſſee at will may take a releaſe of the inheritance, and thereby his eſtate is enlarged; or a confirmation for his life, upon which a remainder may be dependant. Com. Dig. *ut ante* (H. 3.)

Where a leaſe is made at will, the leſſee, after a quarter of a year is commenced, may determine his will, but then he muſt pay that quarter's rent; and if the leſſor determine his will after the commencement of a quarter, he ſhall loſe his rent for that quarter. So, if half yearly. 3 Salk. 223. 4 Mod. 79. Com. Dig. tit. Eſtates (H. 9.)

Tenant at will may be ouſted alſo by expreſs words, or by implication: as if leſſor come upon the land, and ſay that leſſee ſhall not continue over, he may determine his will, though in the abſence of the leſſee. But words off the land will not, till notice to the leſſee. *Ibid.* (H. 6.)

So,

Ibid. So a leſſee at will may be ouſted, and his eſtate determined when the leſſor or leſſee pleaſes.

Cro. Car. 304. If tenant at will take upon him to make a leaſe for years, which is a greater eſtate than he may make, that act is a diſſeiſin [and a determination of the will.]

Com. Dig. *ut ante.* But though leſſee at will make a leaſe to commence at a future day, it does not amount to a determination, till the leaſe commences in point of intereſt. So of an extent, till the *liberate*; and of outlawry, till ſeizure.

Cro. Car. 304. But if ſuch leſſee at will, or a leſſee for years, make a gift in tail, or a leaſe for life, that creates a good leaſe, or a good gift in tail amongſt themſelves and all others, beſides the firſt leſſor; and as to him they are both diſſeiſors.

Ibid. 303. But, though a tenant at will is at the will of both parties, the will ſhall not be determined by every act.

Ibid. 304. Thus, where a feme leſſee at will takes huſband, or a feme makes a leaſe at will and takes huſband, although the feme hath put her will in her huſband, yet it ſhall not be ſaid to be a determination without the election of the leſſor or the huſband.

SECTION IV. *Of Tenants at Sufferance.*

Co. Lit. 57. *b.* Tenant at ſufferance is he who enters by lawful demiſe or title, and afterwards wrongfully continues in poſſeſſion; as if tenant *pur auter vie* continues in poſſeſſion after the death of the *ceſtui que vie.*

Com. Dig. *ut ante.* So, any one who continues in poſſeſſion without agreement, after a particular eſtate is ended.

Co. Lit. 57. *b.* There is a great diverſity therefore between a tenant at will and a tenant at ſufferance; for tenant at will is always by right, whereas tenant by ſufferance entereth by a lawful leaſe, and holdeth over by wrong.

Ibid. But againſt the king there is no tenant at ſufferance, for the king not being capable of committing laches, ſuch perſon will be an intruder.

Ibid. and 271. *a.* So, if a guardian continue in poſſeſſion after the full age of the heir; he is not a tenant by ſufferance, but an abator.

Salk. 245. Mortgagee covenants that mortgagor ſhall quietly enjoy till default of payment, and aſſigns: after aſſignment, mortgagor is only tenant at ſufferance; for his continuing in poſſeſſion does not turn the term to a right.

CHAPTER

CHAPTER VIII.

Of the general Incidents to Leaſes.

SECTION I. *Rent, when and how payable.*

SECTION II. *Of Public Impoſitions, parochial and parliamentary.*

SECTION I. *Rent, when and how payable, &c.*

IN a preceding part of this work we have had occaſion to explain the nature of rent, and the different kinds thereof.

The reſervation of rent ought to be certain; for if a man demiſe, rendering "after the rate of" 18 *l. per ann.* while the leaſe continues, it will be void: for it does not appear what rent he ſhall pay in certain, or what time. 1 Salk. 262. 4 Mod. 79.

If a leaſe be made by a huſband, rendering rent to him for life, and to his wife for life, it will be a reſervation during the life of the ſurvivor. Com. Dig tit. Rent (B. 7.)

As to what is deemed a good reſervation of rent, if a man makes a leaſe of *Blackacre*, to commence *in futuro*, and of *Whiteacre*, to begin *in præſenti*, rendering rent payable at *Michaelmas* before the commencement of the term on *Blackacre*, this a reſervation immediately, for it is but one entire rent, and as ſuch is payable according to the reſervation. Gilb. on Rents, 25.

So it is, if a man grants a future intereſt in land; as if it be a leaſe for years to commence five years after the making of the leaſe, the leſſor may reſerve a rent immediately, becauſe this is a good contract to oblige the leſſee to pay, and the leſſor may have an action of debt on the contract, and may likewiſe have his remedy by diſtreſs for the arrears when the leſſor comes into poſſeſſion. *Ibid.*

A leaſe of the veſture or herbage of the land, reſerving rent, is good; becauſe the leſſor may come upon the land to *Ibid.* 26.

diſtrain the leſſee's beaſts feeding thereon. But a reſervation of graſs, herbage, or other veſture of the land would be bad, becauſe they are part of the thing demiſed.

Co. Lit. 47.

Gilb. on Rents, 32.

So, where by articles of agreement indented between *A.* and *B.* it is covenanted and agreed, that *A.* doth let *Black-acre* to *B.* for five years, provided always that *B.* ſhall pay at *Michaelmas* and *Lady-day* 10 *l.* by even portions yearly; this proviſo is a good reſervation of the rent, for as the words amount to an immediate demiſe of the land, ſo the rent, which is but a retribution for the land, ought to be paid immediately, and it cannot be conſtrued to be a ſum in groſs, becauſe by the words of the articles, (which being indented are the words of both parties,) it is to be paid yearly.

Ibid. 34.

A difference is here to be noted between a rent reſerved entire in the *reddendum* upon a demiſe of ſeveral things in the ſame leaſe, (for the reſervation ſhall be taken as one and entire) and where the rent is not at firſt reſerved entire, but upon the reſervation is ſeveral and apportioned to the ſeveral things demiſed.—For inſtance, if a leaſe be made of ſeveral houſes, rendering the annual rent of 5 *l.* at the two uſual feaſts, *viz.* for one houſe 3 *l.* for another 10 *s.* and for the reſt of the houſes the reſidue of the ſaid rent of 5 *l.* with a clauſe of re-entry into all the houſes for non-payment of any parcel of the rent; this is but one reſervation of one entire rent, becauſe all the houſes were leaſed, and the 5 *l.* was reſerved as one entire rent for them all, and the "*viz.*" afterwards does not alter the nature of the reſervation, but only declares the value of each houſe.

Ibid.

But if the leaſe had been of three houſes, rendering for one houſe 3 *l.* for another 20 *s.* and for the third 20 *s.* with a condition to re-enter into all for the non-payment of any parcel; theſe are three ſeveral reſervations, and in the nature of three diſtinct demiſes, for which the avowries muſt likewiſe be ſeveral; for each houſe in this caſe is only chargeable with its own rent, the entire ſum being not at firſt reſerved out of all the houſes demiſed, and afterwards apportioned to the ſeveral houſes according to their reſpective value, as in the former caſe; but the particular ſums are at firſt reſerved out of the ſeveral houſes, and therefore the

the non-payment of the rent of one houſe can be no cauſe of entry into another.

So, if one demiſes the ſcite and demeſnes of a manor, and alſo the manor itſelf, and all other lands and tenements thereunto belonging, reſerving for the ſaid ſcite and demeſnes and premiſſes therewith letten 9*l.* this is not a joint, but a ſeveral leaſe, *viz.* one leaſe for the ſcite and demeſnes, and another for the reſidue of the manor, and the reſervations alſo are ſeveral and diſtinct. *Ibid.* 36. Cro. Eliz. 341.

So, if a leaſe be made of two manors *habendum*, one manor for 20*s.* and the other manor for 10*s.* theſe are ſeveral reſervations; and each manor is charged with its reſpective rent. Gilb. on Rents, 36.

If the reſpective rents were equal ſums, it would make no difference it ſeems; ſo as the words in the *habendum* make it as ſeveral leaſes.

But where one made a leaſe of a cellar for a year, and if at the end of the year the parties ſhould agree that the demiſe ſhould continue, then to have and to hold the ſame for three years, "rendering from that time annually during the "ſaid term 40*s.*" this is one entire reſervation, as well for the firſt year as for the three years; for the words *dicto termino* extend to both terms indifferently. *Ibid.*

As there may be ſeveral reſervations in the ſame leaſe, by the words of the parties, ſo there may by act of law: as where a leaſe is made to a biſhop in his public capacity, and *J. S.* reſerving a rent; the leſſees are not joint-tenants, but tenants in common, and therefore the reſervation muſt be ſeveral, and the reverſion to which the rent is incident muſt follow the nature of the particular eſtates on which it depends, and therefore muſt be ſeveral alſo. *Ibid.* 37.

So, if there be two tenants in common, and they make a leaſe for life, rendering rent, this reſervation, though made by joint-words, ſhall follow the nature of the reverſion, which is ſeveral in the leſſors; and therefore they ſhall be put to their ſeveral aſſiſes, if they be diſſeiſed, as if they had been diſtinct reſervations. But if the reſervation had been of a horſe, or hawk, or any other thing not in its own nature ſeverable, then for the neceſſity of the caſe, the law admits them to join in one aſſiſe. *Ibid.*

Upon a ſurrender reſerving rent; though the rent is not good by way of reſervation, yet it ſhall be ſo by way of contract.

If a leſſee, however, ſimply covenant to pay ſuch a ſum yearly, without mentioning it as a conſideration of the demiſe of the premiſſes, it has been held to be not a rent, but a ſum in groſs.

Co. Lit. 47. a. Note alſo, a diverſity between a reſervation, which is always of a thing not *in eſſe*, but newly created or reſerved out of the land or tenement demiſed; and an exception, which is ever of part of the thing granted, and of a thing *in eſſe*.

Eſp. R. 80. In a leaſe of lands, for which the leſſor is bound to reſerve the beſt rent that can be got, he muſt reſerve the beſt rent that can be got at the time the leaſe is made, without any regard to a former leaſe in which the rent might have been fairly reſerved on account of money to have been expended in improvements.

Ibid. The rent muſt be reſerved to the leſſor himſelf, and not to a ſtranger; for it ought to be made to him from whom the land paſſes.

Com. Dig. tit. Rent (B. 5.) Therefore, if a man, and *B.* his ſon, reciting that *B.* is his heir apparent, let for years, to commence after the death of the father, (who was ſole ſeiſed) and rendering rent to the ſaid *B.* it will be void; for a reſervation to him by his proper name, and not to him as heir, is the ſame as if it were to a ſtranger.—But the king may make a reſervation of rent to a ſtranger.

8 Co. R. 70. So, if a leaſe for years be made, rendering rent to the heirs of the leſſor, the reſervation it is ſaid is bad, becauſe not to the leſſor firſt: the cleareſt and ſafeſt way is, to reſerve the rent generally during the term, without ſaying to whom, and leave it to be diſtributed by the law.

Shep. Touch. 114. This has always been taken moſt in advantage of the leſſee and againſt the leſſor, and yet ſo as the rent be paid during the time; for if no perſon be mentioned, the reſervation ſhall be extended by implication of law, to the leſſor and his heirs.

Dyer, 5.]

Shep. Touch. 114. But if the reſervation be only to the leſſor, and the deed do not ſay alſo "to his heirs, executors, *&c.*" this reſervation ſhall continue only for the life-time of the leſſor, and ſhall

ſhall determine with his death: for *expreſſum facit ceſſare tacitum.*

So, if the leſſor be ſeiſed in fee, and make a leaſe for life or years, rendering rent to the leſſor, or his executors or aſſigns; in this caſe the rent ſhall continue only for the life of the leſſor. *Ibid.*

But if the reſervation be to the leſſor, his heirs and aſſigns, in the copulative, or in the disjunctive to him or his heirs, or to him or his ſucceſſors, (if it be the leaſe of a corporation,) during the term; then all the aſſignees of the reverſion ſhall enjoy it. *Ibid.* 115.

So, if the reſervation be thus: "yielding and paying ſo "much rent," without any more words, this ſhall be taken for all the time of the eſtate, and ſhall go to him in reverſion accordingly. *Ibid.*

A poſthumous child, born after the next rent-day had incurred, after the death of his father, is under the ſtat. 10 & 11 *W.* 3. *c.* 16. intitled to the intermediate profits of the lands ſettled, as well as the lands themſelves; for that act of parliament was made to enable poſthumous children to take eſtates as if born in their father's life-time. 3 Atk. 203.

If the rent be made payable yearly, without ſaying during the term, the payment muſt be made during the term. Moor, 459.

If there be an order, confirmed by parliament, that an indenture of demiſe, upon which a rent was reſerved, ſhould be vacated and cancelled, and that a ſtranger ſhould enter into the lands demiſed and receive the profits, yet the ſame rent in value granted by the leſſee for the better ſecuring the rent reſerved, is not diſcharged, although the intention appears that there ſhould be but one rent paid. 1 Saund. 196.

If a man ſeiſed of land in fee makes a leaſe for years, reſerving rent to him and his aſſigns during the term, this reſervation ſhall not determine by the death of the leſſor, but the rent ſhall go to his heir; for though there be no mention of his heirs in the reſervation, yet there are words which evidently declare the intention of the leſſor to be that the payment of the rent ſhall be of equal duration with the leaſe, the leſſor having expreſsly provided that it ſhall be paid during the term; conſequently the rent muſt be carried Gilb. on Rents, 66.

ried over to the heir, who comes into the inheritance after the death of the leſſor, and would have ſucceeded in poſſeſſion of the eſtate if no leaſe had been made: and if the leſſor aſſigns over his reverſion, the aſſignee ſhall have the rent as incident to it; becauſe the rent is to continue during the term, therefore it muſt follow the reverſion, ſince the leſſor made no particular diſpoſition of it ſeparate from the reverſion.

1 Wilſ. 375. A rent cannot, however, at law, iſſue out of a term of years, but muſt come out of the reverſion; therefore if a leſſee aſſign his term, he cannot diſtrain for the rent without expreſsly reſerving a power for that purpoſe.

Gilb. on Rents, 67. Shep. Touch. 215. If a leaſe be made for years reſerving rent during the term to the leſſor, his executors and aſſigns, this does not determine upon the death of the leſſor, (as was once wrongly ruled, *Cro. Eliz.* 217.) but goes to the heir, becauſe the reſervation being to the leſſor and his aſſigns "during the "term," (for the words "executors, *&c.*" are void, the leſſor having the inheritance,) ſuch words evidently diſcover the intention of the contract, and that the leſſee agreed and bound himſelf to the payment of the rent during the continuance of the demiſe.

Com. Dig. tit. Rent (B. 5.) If tenant in tail demiſe for years, rendering rent to him and his heirs, this goes to the heir in tail.

Ibid. If tenant for life, with power to make leaſes, demiſes, rendering rent to him, his heirs and aſſigns, it ſhall be adjudged to him in remainder.

Ibid. If a copyholder by licence leaſes, rendering rent to him and his wife, and his heirs, where by the cuſtom the wife has her free-bench, the wife ſhall have the rent as incident to the reverſion.

Ibid. But if a man leaſes, rendering to himſelf without ſaying more, it does not go to his heir, but determines with the death of the leſſor: ſo, though it be to him or his aſſigns, or to him, his executors, and aſſigns.

Co. Lit. 214. *a.* So, if a man reſerve rent to him *or* his heir, it will be good to him for his life, and void to the heir.

Ibid. Com. Dig. *ut ante.* A man may reſerve a rent to himſelf and a different rent to his heir.

If

If there be two joint-tenants, and they make a leaſe for years by parol, or deed-poll, reſerving rent to one only, yet it ſhall enure to both. But if the leaſe had been indented, the reſervation ſhould have been good to him only to whom it was made, and the other ſhould have taken nothing.—The reaſon of the difference is this: where the leaſe is by deed-poll, or by parol, the rent ſhall follow the reverſion, which is jointly in both leſſors; and the rather, becauſe the rent being ſomething given to the joint-tenant to whom it is reſerved in retribution for the land, he ought to be ſeiſed of the rent in the ſame manner as he is of the land demiſed, which is equally for the benefit of his companion and himſelf; but where the leaſe is by deed indented, they are eſtopped to claim the rent in any other manner than it is reſerved by the deed, becauſe the indenture is the deed of each party, and no man ſhall be allowed to recede from his own ſolemn act. Co. Lit. 47. *a.* Gilb. on Rents 63.

So, if two joint-tenants let by deed to *A.* rendering to them 10 *s. per ann.* and only one ſeals the deed, the demiſe ſhall be but of a moiety, rendering only 5 *s. per ann.* Com. Dig. tit. Rent (B. 6.)

If a rent be payable yearly without ſaying "during the ſaid "term," yet the payment muſt be made every year during the continuance of the leaſe. Gilb. on Rents, 51.

If therefore a leaſe be made for years, provided that the leſſor ſhall pay for it at *Michaelmas* and *Lady-day* 10 *l.* by equal portions "during the term," though this rent is not made payable yearly, yet the law conſtrues it to be ſo, becauſe it is payable at the two feaſts during the term, and then conſequently it muſt be paid yearly; for if there be any omiſſion of the payments any one year during the leaſe, it is not paid at the two feaſts during the term. *Ibid.* 50.

If a leaſe be made, rendering rent at the two uſual feaſts of the year, without ſpecifying what feaſts, the law conſtrues ſuch payments to be made at *Michaelmas* and *Lady-day*, becauſe thoſe are the uſual days appointed in contracts of this nature for payments. *Ibid.* 51.

So, if a man grants a rent of 10 *l.* to another, payable at the two uſual feaſts of the year, this ſhall be intended by equal portions, though not ſo mentioned in the deed; becauſe where there are two ſeveral days appointed for payment, *Ibid.*

it is the moſt equal conſtruction that a moiety of the rent ſhall be paid at each day.

Ibid. 49. If a man make a leaſe to another the 6th day of *Auguſt*, rendering yearly the rent of 40*s.* at two terms of the year, *viz.* at *Lady-day* and *Michaelmas*, by equal portions; though in this caſe, by the appointment of the parties, *Lady-day* be the firſt term mentioned, yet the firſt payment ſhall be made at *Michaelmas* enſuing the date of the leaſe; for without ſuch tranſpoſition of the words of the deed, the intention of the parties could never be fulfilled, becauſe the rent is reſerved annually, and the leſſor would loſe the profits of one half year if the rent was not payable the firſt *Michaelmas*; for then the leſſee muſt enjoy the land from the date of the leaſe to the firſt *Michaelmas* without paying any thing; and ſo likewiſe from the laſt *Lady-day* of the term to the expiration of it; becauſe though the rent ended in *Auguſt*, yet the payment was not to be made till the *Michaelmas* following, before which time the leaſe expired.

Ibid. 50. So, if a man makes a leaſe the 1ſt of *May*, reſerving rent payable quarterly; this ſhall be intended quarterly from the making of the leaſe: for if the beginning of the quarter ſhould be conſtrued to be any other day than the date of the leaſe, the leſſor would loſe the profits of his land for ſome time, and conſequently not have quarterly payment made during the continuance of the leaſe.

7 Mod. 97. A rent was reſerved half yearly from *Michaelmas*; an action brought for half a year's rent ending the 25th day of *March*, which was not half a year from *Michaelmas*; and the rent being reſerved half yearly without mentioning any day, there muſt be a full half year before it is due; but otherwiſe, where it is made payable at ſuch and ſuch feaſts, quarterly or half yearly; there though the quarter or half year in reality be not then expired, yet as to the reſervation and payment it is.

2 Ld. Raym. 820. Where there are ſpecial days of payment limited upon the *reddendum* the rent ought to be computed according to the *reddendum*, and not according to the *habendum*: but where the reſervation is general, as half yearly or quarterly, and no ſpecial days are mentioned, there the half year or quarter muſt be computed according to the *habendum*.

If

If tenant in fee makes a leaſe for years to begin at *Michaelmas*, rendering 100*l.* *per annum* at *Michaelmas* and *Lady-day*, or within ten days after every feaſt; it ſeems to be the better opinion that the rent is due the laſt *Michaelmas-day* of the term, without any regard to the ten days; for the reſervation being annual, at the two feaſts or within ten days, it ſhall be conſtrued to be at the end of every ten days *during the term*, as moſt agreeable to the deſign of the contract; and therefore the law rejects the ten days after the laſt feaſt, becauſe the term ending at *Michaelmas*, there cannot be ten days after it during the term, for payment of the rent. This conſtruction is the more reaſonable, becauſe to give the leſſee his election to make the laſt payment either at *Michaelmas* or ten days after, were to put it in his power to avoid payment of the laſt half year's rent: for if it could be conſtrued not to be due till the end of the ten days, the leſſor could never oblige him to pay it, becauſe then the term would be ended before the rent became due; for the addition of the ten days was only to enlarge the time of payment, but not to prevent the payment, or to remit any part of the rent. *Ibid.* 52. Cro. Jac. 227, 233.

If a man demiſe for five years, rendering 100*l.* to be paid by equal portions during the term, it ſhall be paid yearly, though that word was omitted. Com. Dig. tit. Rent (D. 8.)

If the tenant of two tenants in common pay the whole rent to one of them after notice by the other not ſo to pay it, ſuch other tenant in common may diſtrain for his portion. 5 T. R. 246.

If a man, poſſeſſed of a term of one hundred years, make a leaſe for fifty, reſerving rent to himſelf and his heirs, this rent determines at his death; for his heir cannot have it, becauſe he cannot ſucceed to the eſtate, it being but a chattel intereſt, to which the rent, if it continues after the life of the leſſor, muſt belong; and the executors cannot have it, becauſe there are no words to carry it to them. [It would however form a part of the reſiduary eſtate it is conceived, and be aſſets in the hands of the executor or adminiſtrator.] Gilb. *at ante.* 66

Where an inheritor reſerves rent, upon a leaſe for years this ſhall not go to the executor, but to the heir, with the Went. Off. Ex. 53.

reverſion; other than arrearages of it behind at the death of the teſtator.

2 Salk. 578. Therefore where the leſſor died upon *Michaelmas-day* between three and four o'clock in the afternoon, before ſunſet, the rent being reſerved payable on *Michaelmas-day*, the queſtion was, whether the executor or the heir, or, which is the ſame, the jointreſs of the leſſor, ſhould have the rent? It was decreed that the rent ſhould go to the heir or jointreſs, becauſe at the time of the death of the leſſor, there was no remedy nor means to compel the payment thereof.

A term of years, however, being but a real chattel, is aſſets in the hands of the executor or adminiſtrator; and if ſuch be the nature of the thing demiſed, the rent reſerved upon it will of courſe accompany its principal and not go to the heir.

By the ſtat. 32 *H.* 8. *c.* 37. the executors or adminiſtrators of tenant in fee-ſimple, fee-tail, or for term of life, unto whom any rent ſhall be due and not paid at the time of their death, ſhall have an action of debt for ſuch arrearages againſt the tenants, who ought to have paid in the life-time of the teſtator, or againſt the executors or adminiſtrators of the ſaid tenants.

So, with reſpect to the under-tenants of tenant for life, the ſtat. 11 *G.* 2. *c.* 19. *s.* 15. enacts, that where any tenant for life ſhall happen to die before or on the day on which any rent was reſerved or made payable upon any demiſe or leaſe of any lands, tenements, or hereditaments, which determined on the death of ſuch tenant for life, the executors or adminiſtrators of ſuch tenant for life ſhall and may, in an action on the caſe, recover of and from any under-tenant or under-tenants of ſuch lands, *&c.* if ſuch tenant for life die on the day on which the ſame was made payable, the whole, or if before ſuch day, then a proportion of ſuch rent according to the time ſuch tenant for life lived, of the laſt year or quarter of a year, or other time in which the ſaid rent was growing due as aforeſaid, making all juſt allowances or a proportionable part thereof reſpectively.

1 Saund. 287. *n.* 17. As to the time indeed when rent is due, a difference it ſeems ſubſiſts between the caſe of a leaſe made by tenant in fee,

fee, or under a power, and that of one made by a bare tenant for life: in the latter caſe, if the leſſor lives to the beginning of the rent-day, at which time a voluntary payment of rent might be made, that is ſufficient to entitle the executor to the rent, rather than it ſhould be loſt; but in the former caſe, by the death of the leſſor before the laſt inſtant, the rent will go along with the land to him in the reverſion or remainder, becauſe being payable on thoſe days during the term, the leſſee has till the laſt inſtant to pay his rent, and conſequently the leſſor dying before it was completely due, his repreſentatives can make no title to it.

As to the time for the payment of rent; where a time certain is appointed for that purpoſe, or indeed for the tranſacting any other buſineſs generally, neither agent nor patient are bound to attend any other time; and if the thing be to be done on a day certain, but no hour of the day is ſet down wherein the ſame ſhall be done; in this caſe, they muſt attend ſuch a diſtance of time before the ſun ſet, as may be convenient in which to tranſact the buſineſs.

By entry into any part of premiſſes demiſed the rent is ſuſpended. But if the leſſor enter by virtue of a power reſerved, or as a mere treſpaſſer, yet if the leſſee be not evicted, it will be no ſuſpenſion of the rent. Bull. N. P. 165. *Ibid.* 177.

Section II. *Of public Impoſitions, parliamentary and parochial: and of Party-Walls.*

Reſpecting the liability of the landlord or tenant to bear the public impoſitions, whether they be parliamentary taxes or parochial rates, it is a general principle that the occupier of the premiſſes is liable.

Thus the land-tax is not the landlord's tax with reſpect to the public, though it is, as between landlord and tenant. In fact, the land itſelf, in the hands of the occupier, is the debtor to the public: the land-tax, therefore, is *primâ facie* the tenant's tax, becauſe all the remedies are againſt him. Doug. 226, [165] 2 Conſt's Bott's P. L. 273 pl. 281.

The land-tax acts, from the 4th of *W. & M. c.* 1. *s.* 13. and the 28th *G.* 3. *c.* 2. *s.* 17. & 35. to the preſent time, direct the tenant to pay the land-tax in the firſt inſtance, and to deduct out of the rent ſo much of the rate as in reſpect of the ſaid rent the landlord ſhould and ought to pay and bear;

and the landlords both mediate and immediate, according to their reſpective intereſts, are required to allow ſuch deductions.

3 T. R. 377. 2 Str. 1191. Under a covenant, therefore, in a building leaſe, by the tenant, to pay all the taxes, except the land-tax, the landlord is to pay only the *old* land-tax, and not the additional land-tax occaſioned by the improvement of the eſtate; for the legiſlature did not mean that the whole of the land-tax in reſpect of *all* the rent ſhould be borne by the original landlord, but each was to make that allowance in proportion to the rent that came to him.

3 T. R. 379. Upon the ſame principle *A.* having granted a building leaſe to *B.* at the yearly rent of 7*l.* which eſtate *B.* improved, and afterwards under-let at 54*l. per annum. A.* was held liable only to pay the land-tax in proportion to the old rent.

So, on a leaſe in which rent was reſerved, to be paid "without any deduction or abatement whatſoever," it was reſolved that as the land-tax act enables the tenant to deduct that tax out of his rent, he has in all caſes a right to ſtop it, unleſs there is an expreſs agreement to the contrary.

P. Wms. 128. n. But a bill in equity will not lie for a tenant to be relieved out of the arrears of rent, for taxes which he has actually paid on account of rent reſerved to a charity which appears to be exempted from taxes.

2 Conſt's. Bott's. P. L. 268. pl. 280. The act 20 *G.* 3. *c.* 17. *s.* 19. for regulating the right of voting, does not, in the form of aſſeſſment that it gives, prevent pariſhes from rating landlords or other perſons by name; for they may ſtill declare their intention to rate the landlord.

1 *Ibid.* 92. pl. 122. The poor's-rate, alſo, is a charge upon the occupier in regard to his poſſeſſion, and not on the leſſor in regard to the rent received.

Ibid. 93. pl. 125. If a man does not live within a pariſh, he is to be aſſeſſed according to his land; but if he live within the pariſh, he is to be rated as dwelling there.

Of Party-Walls. 8 T. R. 214. The leſſor of a houſe at rack-rent (there being no other perſon entitled to any kind of rent) is liable to contribute to the expences of a party-wall under ſtat. 14 *G.* 3. *c.* 78. though the leſſee has improved the houſe demiſed.

The

The tenant of a houſe covenanted in his leaſe to pay a reaſonable ſhare and proportion of ſupporting, repairing, and amending all party-walls, *&c.* and to pay all taxes, duties, aſſeſſments, and impoſitions parliamentary and parochial, "it being the intention of the parties that the landlord "ſhould receive the clear yearly rent of 60*l.* in net money "without any deduction whatever." During the leaſe the proprietor of the adjoining houſe built a party-wall between that houſe and the houſe demiſed, under ſtat. 14 *G.* 3. *c.* 78. held that the tenant, not the landlord, was bound to pay the moiety of the expence of the party-wall. *Ibid.* 602.

The act of the 7th *G.* 3. *c.* 37. exempting the owner of certain lands embanked from the river Thames from all taxes and aſſeſſments whatſoever, does not exempt the occupiers of houſes built on ſuch lands from the payment of the houſe and window duties impoſed by ſtat. 38 *G.* 3. *c.* 40. *Ibid.* 462.

A leſſee for twenty-one years at a pepper-corn rent for the firſt half year and a rack-rent for the reſt of the term, who by agreement was to put the premiſſes in repair, and covenanted to pay the land-tax and all other taxes, rates, aſſeſſments, and impoſitions, having aſſigned his term for a ſmall ſum in groſs, was held not to be liable to pay the expence of a party-wall, either by the proviſions of the ſtat. 14 *G.* 3. *c.* 78. *s.* 41. or the covenant; for where the parties contract for a leaſe at rack-rent, the landlord is the perſon, who ought to bear the expence of the party-wall. So, where the parties ſtand, as in the principal caſe, in the relation of landlord and tenant, the former is liable under the act of Parliament to pay the expence; for the legiſlature intended to throw the burthen on the leſſees of building leaſes, by whom the value of the eſtates is conſiderably improved, and who afterwards make under-leaſes, reſerving improved rents. 3. T. R. 458. *Ibid.* 461.

If however a large ſum were paid for the purchaſe of a leaſe, the original leſſee, though no improved rent were reſerved to him, would, it ſeems, be liable to pay this expence within the act of parliament. *Ibid.*

CHAPTER

CHAPTER IX.

Of the general Incidents to Leaſes (continued.)

SECTION I. *Of Waſte, wherein of Fixtures.*
SECTION II. *Of Common of Eſtovers.*
SECTION III. *Of Emblements.*

SECTION I. *Of Waſte.*

Co. Lit. 53. WASTE *vaſtum*, is a ſpoil or deſtruction in houſes, gardens, trees, or other corporeal hereditaments, to the diſheriſon of him that hath the remainder or reverſion in Wood's In. 521. fee-ſimple or fee-tail.—Waſte, is either *voluntary*, which is a crime of commiſſion, as by pulling down a houſe, or it is *permiſſive*, which is a matter of omiſſion only, as by ſuffering it to fall for want of neceſſary reparations: both of which are equally injurious to him that hath the inheritance.

Whatever does a laſting damage to the freehold or inheritance is waſte: therefore, removing wainſcot, floors, or other things once fixed to the freehold of a houſe, is waſte. With reſpect however to what ſhall be deemed fixtures of ſuch a nature or under ſuch circumſtances as that they can or cannot be removed by an outgoing tenant, or taken by his executor, or by the heir; the law is much leſs ſtrict at 3 Atk. 16. *n.* 1. this day, than it uſed to be. The old and general rule of law was, that whatever was fixed to the freehold became part of it, and could not be take away. But of late years there have been two exceptions to this rule. The firſt is between landlord and tenant, the latter of whom may now take away during the term all chimney-pieces, and even 1 Atk. 477, 8. wainſcot put up by himſelf; ſo of beds faſtened to the ceiling with ropes; nay even though nailed: and all ſuch things neceſſary for trade, as brewing utenſils, furnaces, coppers,

pers, fire-engines, cyder-mills, &c. as he has himſelf put up or erected.

But ſuch removal muſt be *within the term*, otherwiſe he will be deemed a treſpaſſer. Thus, where tenant for years made an under-leaſe of a houſe to *J. S.* who was by trade a ſoap-boiler: *J. S.* for the convenience of his trade, put up vats, coppers, tables and partitions, and paved the back-ſide, &c. and now upon a *fieri facias* againſt *J. S.* which iſſued on a judgment in debt, the Sheriff took up all theſe things, and left the houſe ſtripped and in a ruinous condition, ſo that the firſt leſſee was liable to make it good, and therefore brought a ſpecial action on the caſe againſt the Sheriff and thoſe that bought the goods, for the damage done to the houſe. *Et. per Holt* C. J. it was held; 1ſt. that during the term, the ſoap-boiler might well remove the vats he ſet up in relation to trade, and that he might do it by the common law, (and not by virtue of any ſpecial cuſtom) in favour of trade and to encourage induſtry: but after the term, they become a gift in law to him in reverſion, and are not removeable; 2dly. that there was a difference between what the ſoap-boiler did to carry on his trade, and what he did to complete the houſe, as hearths and chimney-pieces, which he held not removeable; [the latter however at leaſt, are now removeable;] 3dly. that the Sheriff might take them in execution, as well as *the under-leſſee might remove them*; and ſo this was not like tenant for years without impeachment of waſte: in that caſe he allowed the Sheriff could not cut down and ſell, though the tenant might; and the reaſon is, becauſe in that caſe, the tenant hath only a bare power without an intereſt, but here, the under-leſſee hath an intereſt as well as a power, as tenant for years hath in ſtanding corn, in which caſe the Sheriff can cut down and ſell. 1 Salk. 368.

The ſecond exception is between tenant for life or in tail, and the reverſioner or remainder-man. The former alſo, may remove brewing utenſils, furnaces, coppers, fire-engines, cyder-mills, &c. which he has erected, and by which he not only enjoys the profit of the eſtate, but carries on a ſpecies of trade: and if he does not remove them in his life-time, they go to his executor. Reaſons of public benefit and 1 Atk. 477, 8. 3 Atk. 16.

and convenience have tended to eſtabliſh this principle; and indeed it is but conſonant to common ideas of juſtice: as for inſtance, in the caſe of a fire-engine, it is very well known that little profit could be made of coal-mines without ſuch an engine; and tenants for life would be diſcouraged in erecting them, if they muſt go from their repreſentatives to a remote remainder-man, when the tenant for life might poſſibly die the next day after the engine was ſet up. So, emblements go to the executor, and not to the remainder-man, the public being intereſted in the produce of
2 P. Wms. 94. corn and other grain. Hangings, chimney-glaſſes, or pier glaſſes, being matters of ornament and furniture, do not go
Bull. N. P. 34. with the houſe, but to the executor.—In trover for ten load of timber, the caſe was, that the defendant had been tenant to the plaintiff, and erected a barn upon the premiſſes, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was uſual in that country to erect barns ſo, in order to carry them away at the end of the term, a verdict was given for the defendant. But though Lord Chief Juſtice *Treby* thought proper in that caſe, to take advantage of the cuſtom of the country, yet it is apprehended that it would now be determined in favour of the tenant without any dif-
H. Bl. Rep. 258 ficulty.—But when a purchaſer of lands had brought an ejectment againſt the tenant from year to year, and the parties had entered into an agreement that judgment ſhould be entered for the plaintiff with a ſtay of execution till a given period; though in ſuch agreement no mention was made of any buildings or fixtures, it was held that the tenant could not in the mean time remove buildings (a wooden ſtable ſtanding upon rollers) or fixtures (poſts or rails) from the premiſſes, which he had himſelf erected before action brought; becauſe the fair interpretation of ſuch agreement was, that the defendant ſhould in the mean time do no act to alter the premiſſes, but ſhould deliver them up in the ſame condition, as when the agreement was made; and judgment ſigned. As however, according to the principle of the preceding caſes, he was entitled to ſuch (ſuppoſed) fixtures, he might it is conceived maintain trover for them againſt
1 Atk. 478. the purchaſer, after execution. If a man ſells a houſe where

where there is a copper, or a brewhouſe where there are utenſils, unleſs there was ſome conſideration given for them, and a valuation ſet upon them, they would not paſs.

The rule however ſtill holds as between heir and executor: the freehold deſcending on the heir, the executor cannot enter to take away fixtures without being a treſpaſſer.— An action of trover was brought by the plaintiffs as adminiſtrators of *Robert Lawton* againſt the defendant for certain ſalt-pans which were put into wyche houſes in *Cheſhire*. The pans were brought in in pieces. The wyche houſes are of no uſe without the pans, nor is the brine of any uſe without them. There was room for the workmen to walk round them within the building. The pans were fixed by brick and mortar to the floor of the building; and there was a furnace under it. The building had lodging rooms at the end of it; which building, with the pans, let for 8*l.* a week. The queſtion was, whether theſe pans were to go to the executor or to the heir. The anceſtor was ſeiſed in fee. Lord *Mansfield* delivered the opinion of the Court. All the old caſes (and there are ſome to be found in the year-books, ſee *Shep. Touch.* 469, 470.) lean in favour of the heir, and ſo rigidly, that if a tenant was to put up a wainſcot or pictures let into the wainſcot, *&c.* he could not take them away.

Ibid. 477.

Lawton v. Lawton, B. R. Eaſt. 22 G. 3. cited *n.* 1. 3 Atk. 16.

There has been a relaxation of two ſpecies of property, the one between landlord and tenant, as marble chimney-pieces, and things which are neceſſary for trade, *&c.* and in the removal of theſe there is no hurt to the landlord. The tenant ſays, I leave the premiſſes juſt as I found them.

In an action of covenant brought by the plaintiff againſt the defendant who had been his leſſee, under a leaſe containing a covenant that the leſſee ſhould leave all the buildings which then were, or ſhould be erected on the premiſſes during the term, in repair, *&c.* the breach aſſigned was, that the defendant took down and carried away two ſheds, which had been erected during the term. The defendant pleaded performance of the covenants, and iſſue was taken on the breach as above aſſigned. The buildings in queſtion were two ſheds, called *Dutch* barns, which had been erected by the defendant during his term; and which

Eſp. R. 11.

his

his counſel contended he had a right to remove. Lord *Kenyon*—If a tenant will build upon premiſſes demiſed to him a ſubſtantial addition to the houſe, or add to its magnificence, he muſt leave his additions at the expiration of the term, for the benefit of his landlord: but the law will make the moſt favourable conſtruction for the tenant, where he has made neceſſary and uſeful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been held ſo in the caſe of cyder-mills, and in other caſes; and I ſhall not narrow the law, but hold erections of this ſort, made for the benefit of trade, or conſtructed as the preſent, to be removable at the end of the term. It was then contended, that by the expreſs words of the covenant the tenant was to leave all erections on the premiſſes at the end of the term. Lord *Kenyon*—I am aware of the full extent of that, and not quite ſure that it concludes the queſtion. It means that the tenant ſhall leave all thoſe buildings which are annexed to and become part of the reverſionary eſtate.

The other ſpecies in which there has been a relaxation is, between tenant for life and the remainder-man, as fire-engines, *&c.* The tenant for life will not erect ſuch things unleſs they can go to his executor. But I cannot find any caſe (except that about the cyder-mill) where there has been any relaxation between the heir and executor. That caſe moſt probably turned upon a cuſtom. Now conſider the preſent caſe, which is very ſtrong. A ſalt brine in the county of *Cheſhire* is a moſt valuable inheritance. But there is no enjoying the inheritance without the buildings and ſalt-pans: they are of no uſe but for that purpoſe, and the inheritance is of no value without them. To the executors they can be worth no more than old iron and old bricks, if taken away. Here the anceſtor erected them at his own expence on his fee-ſimple. It is impoſſible that he ſhould mean them to be ſevered at his death; for they are worth nothing to an executor, and very valuable to the heir. It would have been a very different conſideration, if this ſalt-brine had been let to a tenant who had erected theſe pans. There, he might have ſaid, I was at the expence of erecting them, and therefore my executor ſhould have them;

them; and I leave the eſtate as I received it. Therefore we are of opinion they go to the heir. Judgment for the defendant.

If a houſe be deſtroyed by tempeſt, lightening, or the like, which is the act of Providence, it is no waſte: and the ſtat. 6 *Annæ*, *c.* 31. enacts, that no action ſhall be proſecuted againſt any perſon in whoſe houſe any fire ſhall accidentally begin; with a proviſo that the act ſhall not defeat any agreement between landlord and tenant. But a leſſee who covenants to pay rent, and to repair, with expreſs exception of caſualties by fire, is liable upon the covenant for rent, though the premiſſes are burned down and not rebuilt by the leſſor after notice: and if he covenants generally to repair, he is bound to rebuild the premiſſes, if they be burned by an accidental fire.

2 Bl. Com. 2

1 T. R. 7

6 T. R. 650.

Waſte may be done in houſes, by pulling them down, or ſuffering them to be uncovered, whereby the rafters or other timber of the houſe are rotten: but the bare ſuffering them to be uncovered, without rotting the timber, is not waſte. Converting two chambers into one, or *è converſo*, or converting an hand-mill into an horſe-mill, is waſte. But if a houſe be uncovered when the tenant cometh in, it is no waſte in the tenant to ſuffer the ſame to fall down. But though the houſe be ruinous at the tenant's coming in, yet if he pull it down it is waſte, unleſs he re-edify it again; yet if a houſe built *de novo* was never covered in, it is no waſte to abate it. Alſo, if glaſs-windows (though glazed by the tenant himſelf) be broken down or carried away, it is waſte; for the glaſs is part of his houſe. If the houſe be diſcovered [uncovered] by tempeſt, the tenant muſt in convenient time repair it: and though there be no timber growing upon the ground, yet the tenant muſt at his peril keep the houſe from waſting.

Co. Lit. 53, 4. and notes.

The law favours the ſupport and maintenance of houſes for the habitation of mankind: therefore if two or more joint-tenants or tenants in common be of a houſe of habitation, and the one will not repair the houſe, the other ſhall have by the law a writ of *de reparatione facienda*, and the writ ſaith *ad ſuſtentationem ejuſdem domûs teneantur*. So it is, if the leſſor, by his covenant, undertake to repair the

houſes, yet the leſſee (if the leſſor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto.

Ibid. But if the tenant do or ſuffer waſte to be done in houſes, yet if he repair them before any action brought, there lieth no action of waſte againſt him; but he cannot plead *quod non fecit vaſtum*, but the ſpecial matter.

The tenant cuts down trees for reparations, and ſells them, and afterwards buys them again and employs them about neceſſary reparations; yet it is waſte by the vendition: he cannot ſell trees and with the money cover the houſe.

If the tenant of a dove-houſe, warren, park, vivary [a fiſh pond], eſtangues, or the like, do take ſo many as ſuch ſufficient ſtore be not left as he found when he came in, this is waſte; and to ſuffer the pale to decay, whereby the deer is diſperſed, is waſte: but a wall uncovered when the tenant cometh in, is no waſte if it be ſuffered to decay.

If *B.* leſſee of warren by charter or preſcription, ploughs the land, it is waſte: *contra*, if it be only land ſtored with conies, and not a legal warren; and ſtopping and digging coney-burrows is not waſte in a warren. If tenant cut down or deſtroy any fruit-trees, growing in the garden or orchard, it is waſte; but if ſuch trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waſte.

Ibid. Waſte may alſo be committed in reſpect of timber trees, (*viz.* oak, aſh, and elm, and theſe be timber trees in all places), either by cutting them down or topping them, or doing any act whereby the timber may decay; for timber is part of the inheritance. Alſo, in countries where timber is ſcant, and beech or the like are converted to building for the habitation of man, or the like, they are all accounted timber. Cutting down of willows, beech, birch, aſpe, maple, or the like, ſtanding in the defence and ſafeguard of the houſe, is deſtruction: ſo, if there be a quickſet fence of white thorn, if the tenant ſtub it up, or ſuffer it to be deſtroyed, this is deſtruction; and for all theſe and the like deſtructions, an action of waſte lieth. But cutting up of quick-ſets is not waſte, if it preſerves the ſpring; nor is cutting of aſh under the growth of twenty years waſte.

If,

If, during the eſtate of a mere tenant for life, timber is ſevered either by accident or by wrong, it belongs to the firſt perſon who has a veſted eſtate of inheritance. But where there are intermediate contingent eſtates of inheritance, and the timber is cut down by combination between the tenant for life and the perſon who has the next veſted eſtate of inheritance; or if the tenant for life himſelf has ſuch eſtate and fells timber; in theſe caſes, the Court of Chancery will order it to be preſerved for him who has the firſt contingent eſtate of inheritance under the ſettlement. 3 P. Wms. 268.

A tenant for life without impeachment of waſte has as full power to cut down trees and open new mines, for his own uſe, as if he had an eſtate of inheritance; and is in the ſame manner entitled to the timber, if ſevered by others. 1 T. R. 54.

This privilege, given by the words *without impeachment of waſte*, is annexed to the privity of eſtate; ſo that if the perſon to whom that privilege is given change his eſtate, he loſes the privilege. It has been held that the intent of this clauſe is only to enable the tenant to cut down timber and open new mines, and that it does not extend to allow deſtructive or malicious waſte; ſuch as cutting down timber which ſerves for the ſhelter or ornament of the eſtate. Co. Lit. 220. *n.* 1. 3 Wood. 399.

If the tenant ſuffer the houſes to be waſted and then fell down timber to repair the ſame, this is a double waſte. Digging for gravel, lime, clay, brick, earth, ſtone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and not open when the tenant came in, is waſte; but the tenant may dig for gravel or clay for the reparation of the houſe, as well as he may take convenient timber trees. Co. Lit. 53.

But if the pits or mines were open before, it is no waſte in the tenant continuing to dig them for his own uſe; for it is now become the mere annual profit of the land. 2 Bl. Com. 282.

A party may come into a court of equity to reſtrain another from opening mines, *&c.* even if he has only threatened to do it; nor is it neceſſary that the plaintiff ſhould have waited till the waſte is actually committed, where the intention appears, and the defendant, even by his anſwer, inſiſts on his right to do it: indeed, if the defendant, by his anſwer, had diſclaimed any right, there would be no grounds for 2 Atk. 183.

Co Lit. 53. ſuch a ſuit. Though mines be open at the time, one cannot take timber to uſe in them. It is waſte to ſuffer a wall of the ſea to be in decay, ſo as by the flowing and re-flowing of the ſea the meadow or marſh is ſurrounded, whereby the ſame becomes unprofitable; but if it be ſurrounded ſuddenly by the rage or violence of the ſea, as by tempeſt, without any default of the tenant, it is no waſte puniſhable. So it is, if the tenant repair not the banks or walls againſt rivers, or other waters, whereby the meadows or marſhes be ſurrounded, and become ruſhy and unprofitable.

It is a general principle, that the law will not allow that to be waſte, which is not in any way prejudicial to the inheritance: nevertheleſs it has been held, that a tenant or leſſee cannot change the nature of the thing demiſed.—Therefore if the tenant convert arable land into wood, or *è converſo*, or meadow into arable, it is waſte; for it changes not only the courſe of huſbandry, but the proof of

Cro. Jac. 182. his evidence. The ſame rule is to be obſerved with regard to converting one ſpecies of edifice into another, even though it be thereby improved in its value. Thus if a leſſee convert a corn-mill into a fulling-mill, it is waſte,

1 Lev. 309. though the converſion be to the leſſor's advantage. So, the converſion of a brewhouſe of 120*l.* *per annum* into other houſes let for 200*l.* *per annum* is waſte; becauſe of the alteration of the nature of the thing, and of the evidence.

1 Mod 95. So, if the tenant pull down a malt-mill and build a corn-mill it is waſte.—Waſte in the houſe is waſte in the curtilage, and waſte in the hall is waſte in the whole houſe.

SECTION II. *Of Common of Eſtovers; wherein of Wood.*

Co. Lit. 122. *a.* 2 Bl. Com. 35. Common imports a privilege to take a profit in common with many. Common of eſtovers, or *eſtouviers*, that is neceſſaries, (from *eſtoffer* to furniſh,) is a liberty of taking neceſſary wood for the uſe and furniture of a houſe or farm from off another's eſtate. Eſtovers are three kinds in law, and are incident to the eſtate of every tenant, whether for life or years; but not at will, for ſuch eſtate is too mean.

Ibid. The Saxon word *bote*, which ſignifies allowance or compenſation, is uſed by us as ſynonymous to the French *eſtovers*, and therefore houſe-bote is a ſufficient allowance of

of wood to build or repair the houſe, or to burn in it, which latter is ſometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all inſtruments of huſbandry, as ploughs, carts, harrows, rakes, forks, *&c.*; and hay-bote or hedge-bote is wood for repairing hedges or fences, as pales, ſtiles, and gates, to ſecure incloſures. Theſe botes or eſtovers muſt be reaſonable ones, and ſuch any tenant or leſſee may take off the land let or demiſed to him, without waiting for any leave, aſſignment, or appointment of the leſſor, unleſs he be reſtrained by ſpecial covenant to the contrary, (which is uſually the caſe): for houſe-bote, hay-bote, and fire-bote, do appertain unto a termor of common right, and he may take wood for the ſame: but if the tenant take more houſe-bote than needful he may be puniſhed for waſte. Wood's Inſt. 344. F. N. B. 59. M. Terms de Ley.

Common of eſtovers cannot be appendant to land, unleſs it be by preſcription; but to a houſe to be ſpent there. Therefore, though it be ſaid, that a cuſtom that if the houſe fall the materials ſhall be the tenant's, would not be good; yet when a houſe, having eſtoppers appendant or appurtenant, is blown down by wind, if the owner rebuild it in the ſame place and manner as before, his eſtovers ſhall continue. So, if he alter the rooms and chambers, without making new chimnies; but if he erect any new chimnies he will not be allowed to ſpend any eſtovers in ſuch new chimnies. But a preſcription to have eſtovers, not only for repairing, but building new houſes on the land is good: yet it ſeems, if a man have common of eſtovers by grant, he cannot build new houſes to have common of eſtovers for thoſe houſes. Co. Lit. 121. *b.* F.N.B. 180. C. *b.* 12 Mod. 95. 4 Rep. 87. 4 Leon. 383. Cro. Jac. 25. F.N.B. 180. H.

It may not, here, be ſuperfluous, to explain the meaning of the terms *appendant* and *appurtenant*.—A thing *appendant* is that which beyond memory has belonged to another thing more worthy, which it agrees with in its nature and quality. Therefore a common of turbary [that is a right to dig turf] eſtovers, *&c.* may be appendant to a houſe; for a thing incorporeal may be appendant or appurtenant to a thing corporeal; but a thing corporeal cannot be appendant to a thing corporeal, as land cannot be appendant to land: and common appendant muſt be by preſcription, for it Co. Lit. 121. *b.* 1 Rol. 230. l. 36. *Ibid.* h. 50. *Ibid.* 396. l. 42.

Co. Lit. 121. *b.* 1 Vent. 407. F.N.B. 181. N. cannot begin at this day.—A thing *appurtenant* is that which commences at this day; as if a man at this day grant to one common of eſtovers, or of turbary, in fee-ſimple, to burn in his manor; and if he make a feoffment of the manor the common ſhall paſs to the feoffee. Common appurtenant, therefore, is claimable by an exiſting grant, as well as by preſcription.

Cro. Car. 482.

F.N.B. 180. D. *c.* The lord may have the land of his tenant common appendant to his own demeſnes: and occupiers of land may, by cuſtom, claim a right *in alieno ſolo*; though inhabitants cannot, becauſe inhabitancy is too vague a deſcription and extends to many others, beſides the actual occupiers of houſes or land. If a man have common of eſtovers in the woods of another, and he who is tenant and owner of the wood cut down all the wood, he who ought to have the eſtovers ſhall not have an action of waſte, but ſhall have aſſiſe of his eſtovers. Treſpaſs alſo would lie and be a better remedy.

2 Bl. R. 928.

F. N. B. 59. A. *Ibid* 178. F. *d.*

12 Mod. 379.

F. N. B. 59. K. The tenant may cut trees to mend houſes, *&c.* and to do reparations: but if houſes decay by the default of the tenant to cut trees to amend them is waſte. Not ſo, however, if they were ruinous at the time of the leaſe made: but if a frame was once covered in the time of the leſſor, and the leſſee eraſe it after his death, the heir ſhall have waſte.

Ibid. 60. Q. Dyer R. 36.

Ibid.

9 Rep. 113. If the tenant who hath common of eſtovers ſhall uſe them to any other purpoſe than he ought, he that owns the wood may bring treſpaſs againſt him; as where one grants twenty loads of wood to be taken yearly in ſuch a wood, ten loads to burn, and ten to repair pales; here he may cut and take the wood for the pales, though they need no amending, but then he muſt keep it for that uſe.

Cro. Eliz. 499. So, where two elms were cut down for the purpoſe of repairs, one of which only was uſed, it was ſaid, that although that tree which was not employed [and which had been felled five years] was more than ſufficient to repair the houſe; yet ſeeing that the tenant cut it down for that purpoſe, and peradventnre did not know what would ſerve for that purpoſe, it was not any forfeiture; for it had been adjudged, that where one cut down wood to make hedges, and

uſed the greater part therof in hedging, yet for the reſt that was cut down for that purpoſe, no tithes ſhall be paid.

By the ſame reaſon that he may cut down timber to repair the houſe, a tenant may dig for gravel or clay, though no pit was open at the time of the leaſe, for the ſame purpoſe. Wood's Inſt. 523. 1 Inſt. 53. *b.* 2 T. R. 391.

Though the tenant may cut down and take ſufficient wood to repair walls, pales, fences, hedges, *&c.* as he found them, yet he may not do ſo to make new ones. 1 Inſt. 53. Wood's Inſt. 525.

The tenant may cut down dead wood; and it is not waſte to fell ſeaſonable wood which is uſed to be felled every twenty years, or within that time; but oaks cannot be ſaid to be ſeaſonable wood, which are paſſed the age of twenty years; but by a cuſtom in any place, where is plenty of wood (timber) oaks, under twenty years, may be ſeaſonable wood; and ſuch cuſtom may be alledged in the wood itſelf. F. N. B. 59. M. *Ibid. d.*

With reſpect to what wood ſhall be deemed timber, it is the cuſtom of the country which makes ſome trees timber, which, in their nature, generally ſpeaking, are not ſo, as horſe-cheſnut and lime-trees: ſo of birch, beech, and aſp; and as to pollards, notwithſtanding what is ſaid in *Plowd.* 470. that theſe are not timber, and that tithes are to be paid of their loppings, (which could not be if pollards were timber,) yet if the bodies of them be ſound and good, I incline to think them timber; *ſecus* if not ſound, they being in ſuch caſe fit for nothing but fuel. *Per* Lord Chancellor *King*. So walnut-trees, where of conſiderable value, are to be eſtimated as timber. 2 P. Wms. 602.

So, a termor may cut the under-wood growing under the great woods and tall woods; but if there be not any tall wood, then he cannot cut the under-wood; for where waſte was brought for topping and lopping twenty aſhes and twenty elms, on demurrer it was adjudged for the plaintiff. F. N. B. 60. E. *Ibid. b.*

It has, however, notwithſtanding, been held to be a good cuſtom, that copyholders in fee ſhall have the loppings of pollengers, and the Lord cannot, in ſuch caſe, cut the trees down, for that would deprive the copyholder of the future loppings. [Pollengers or pollards are ſuch trees as have been uſually cropped, therefore diſtinguiſhed from timber-trees.] And it has been reſolved that by the Cro. Car. 679. Plowd. 469. Cro. Eliz. 361.

common law, a copyholder may cut off the under boughs, though not the top boughs, for ſuch lopping cannot cauſe any waſte.

F.N.B.59 M.*f.* If a man fell trees it is waſte, if it be not to repair, I preſume; and if he ſuffers the germins upon the roots of the trees to be again newly deſtroyed, it is new waſte; and treble damages ſhall be recovered for both. [Germins, *à germina*, the young ſhoots of trees.]

Ibid. N. *i.* Though the termor hath of common right oaks, elm, aſh, *&c.* for repair of the houſe, and underwood *&c.* for incloſures and firing, yet it is ſaid he cannot cut either oaks or aſh for fire-wood; but the cutting of the age of ſeven years is not waſte.

Ibid. M. If a man cut wood to burn, where he hath ſufficient dead wood, it is waſte.

Ibid. 60. A. Cutting down willows in the ſite of the manor is ad-
3 P. Wms. 268. judged waſte.—So trees, though decaying, if for the defence and ſhelter of the houſe, or for ornament, ſhall not
3 Atk. 756. be cut down; and a court of equity, in ſuch caſe, will
Ibid. 216. grant an injunction to ſtay waſte; and this, whether the
1 T. R. 54. trees grow naturally or were planted; for if they ſerve as an ornament, or for ſhelter, it is the ſame thing.

2 Atk. 217. A rector may cut down timber for the repairs of the parſonage-houſe, or the chancel, but not for any common purpoſe; and, if it is the cuſtom of the country, he may cut down underwood for any purpoſe, but if he grubs it up it is waſte. He may cut down timber likewiſe for repairing any old pews that belong to the rectory; and he is alſo entitled to botes for repairing barns and out-houſes belonging to
F. N. B. 60. K. the parſonage.—And a parſon or prebendary ſhall have a writ of waſte upon their leaſe.

3 P. Wms. 268. Windfalls are the property of the lord; for the timber while ſtanding is part of the inheritance; but whenever it is ſevered, either by the act of God, as by a tempeſt, or by a treſpaſſer and by wrong, it belongs to him who has the firſt eſtate of inheritance, whether in fee or in tail, who may bring trover for it.—If *A.* be tenant for years, remainder to *B.* for life, remainder to *C.* in fee, *A.* is doing waſte; *B.* though he cannot bring waſte, as not having the inheritance, yet he is intitled to an injunction; not ſo, however,

if

if it be trivial, or meliorating waſte; or if the reverſioner or remainder-man in fee be not made a party, who poſſibly may approve of the waſte.

The right to timber, which ſo belongs to thoſe who at the time of its being ſevered from the freehold were ſeiſed of the firſt eſtate of inheritance, gives them a property which becomes veſted. 2 P. Wms. 241.

It is true, that the firſt owner of the inheritance *in eſſe* ſhall have timber blown down, but as an eſtate in contingency is no eſtate, and the trees muſt become the property of ſomebody, therefore the firſt remainder-man of the inheritance in being takes them. 3 Atk. 755.

So, with reſpect to the caſe of a copyholder, who has only a poſſeſſory property in the timber trees, which if ſevered from the freehold by tempeſt or otherwiſe, the property will be in the lord: and a cuſtom for the tenant to claim ſuch trees would be a hard one, and ſo likewiſe of the materials of the houſe. In either caſe, being things annexed to the inheritance, the ſeverance ſhall not transfer the property; this therefore is to be underſtood as of a copyholder, not of inheritance. 11 Mod. 68. *Ibid.* 95.

For, as to a right to cut down timber by cuſtom, where a copyholder hath the inheritance, and where his ſucceſſor comes in by his nomination, there ſuch a cuſtom may be good: but a cuſtom for a copyholder for life to cut down and fell trees, was held not to be good, unleſs it be to build new houſes on the land. Cro. Car. 222. Cro. Jac. 25.

A cuſtom that every copyholder tenant may cut down trees at their will and pleaſure, is unreaſonable and void, for then a tenant at will might do it; ſo it is for a copyholder for life to do it; and one of the reaſons given is, that the ſucceeding copyholder would not have wherewithal to maintain the houſe and plough, which plainly intimates, that a copyholder may cut timber to make reparations, and the rather, becauſe permiſſive waſte is a forfeiture in him. Gilbert's Tenures, 237. Cro. Jac. 29.

The lord may cut down timber trees, leaving ſufficient, and the cuſtom to cut makes no alteration; for it has been reſolved, that every copyholder *de com jure*, [of common right] may take trees for houſe-bote; ſo that the laying the cuſtom ſeems to be only by way of caution. Gilbert's Tenures, 239.

This

11 Mod. 18. 12 Mod. 378. Salk. 638. Holt, 162. Com. Rep. 71. 1 Ld. Raym. 551. Ld. Raym. *ante.* & 11. Mod. 68.

This right to take *trees* is, perhaps, rendered ſomewhat doubtful, by the reverſal on error brought in parliament of the judgment in the caſe of *Aſhmead* againſt *Ranger.*

It is clear, however, that a copyholder may take the neceſſary eſtovers or botes on his copyhold without a ſpecial cuſtom.

4 Co. 31. *b.*

But to enable him to take them on *other lands*, a ſpecial cuſtom muſt be ſhewn.

Cro. Car. 242.

If a ſtranger cut down a timber tree during the term, the leſſor may maintain trover againſt him for it.

3 P. Wms. 268.

As a tenant for life has a right to what may be ſufficient for repairs and botes, care muſt be taken in felling timber, to leave enough upon the eſtate for that purpoſe; and whatever damage is done to the tenant for life on the premiſſes by him held for life, the ſame ought to be made good to him.

Cro. Eliz. 413.

Eſtovers may be granted in fee, and in a grant of eſtovers, the grantor may take the trees with the grantee. But underwood is a thing of inheritance and perpetuity, and may be granted in fee by copy of court-roll, and will ſupport treſpaſs *quare clauſum fregit*; for in ſuch caſe, the grantor cannot meddle with the woods, nor can his leſſee; for he hath entirely granted the underwood, and not eſtovers or ſo many loads of wood.

Bull. N. P. 85.

It is not neceſſary to have an intereſt in the ſoil to maintain treſpaſs *quare clauſum fregit*, an intereſt in the profits is ſufficient, as he who has *prima tonſura*. So where there is an *excluſive right*, as to dig turf, though the ſoil was not granted, and did not paſs, treſpaſs *quare clauſum fregit* will lie; but for a mere *right of common* of turbary it will not. In pleading a right to enter a common to dig for and carry away ſand and gravel for the repairs of the houſe, it is neceſſary to alledge that the houſe was out of repair, that the party entered for the purpoſe of digging for and carrying away ſand and gravel for the neceſſary repairs of that houſe, and that the materials were uſed for that purpoſe.

1 Ld. Raym. 552.

The leſſor cannot enter and cut trees, unleſs excepted upon the demiſe of the land, though after ſeverance they are his. But where they are not demiſed he may.

If

If the lord of a manor cut down ſo many trees as not to leave ſufficient eſtovers, his copyholder may bring treſpaſs againſt him, and recover the value of the trees in damages; and even if the lord leave ſufficient eſtovers, yet he ſhall recover ſpecial damages, *viz.* for the loſs of his umbrage, breaking his cloſe, treading down his graſs, *&c.* for the tenant had the ſame cuſtomary or poſſeſſory intereſt in the trees that he has in the land; and if the lord has a mind to cut trees, his buſineſs is to compound with the tenant. 12 Mod. 379. Bull. N. P. 85. *f. c.*

But an encloſure of the common by the lord may be no interruption of the tenant's enjoyment of their common of eſtovers; nay, probably it may be better for ſuch encloſure. If indeed, by ſuch encloſure, their common of eſtovers were affected, or they were interrupted in the enjoyment of it, they might certainly bring their action; and the lord, in ſuch caſe, could not juſtify ſuch encloſure in prejudice to thoſe rights. 6 T. R. 748.

If the lord of a manor plant trees on a common, the commoner has no right to abate them, though there be not a ſufficiency left; his remedy is by action. But if the lord ſo plant as to deſtroy the common, ſuch an act would be conſidered as a nuiſance, and the commoner might abate it. 2 Boſ. & Pull. R. 13.

The diſtinction ſeems to be this: if the lord of the manor make a hedge round the common, or do any other act that entirely excludes the commoner from exerciſing his right, the latter may do whatever is neceſſary to let himſelf into the common; but if the commoner can get at the common, and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that caſe his remedy is by an action on the caſe, or by an aſſiſe, and he cannot aſſert his right by any act of his own. 6 T. R. 485.

Section III. *Of Emblements.*

The word emblements is derived from the French *emblavence de bled*, corn ſprung or put above ground, and ſtrictly ſignifies the profits of ſown land; but the doctrine of emblements extends not only to corn ſown, but to roots planted, or other annual artificial profits.—Hops growing out of antient roots have been held to be like emble- 2 Bl. Com. 123. Cro. Car. 515.

ments, which ſhall go to the huſband or executor of the the tenant for life, and not to him in remainder; and are not to be compared to apples or fruits, which grow of themſelves.

2 Bl. Com. 123. But it is otherwiſe of fruit-trees, graſs, and the like, which are not planted annually at the expence and labour of the tenant, but are either a permanent or a natural profit of the earth; for when a man plants a tree, he cannot be preſumed to plant it in contemplation of any preſent profit; but merely with a proſpect of its being uſeful to himſelf in future, and to future ſucceſſions of tenants.

In ſome caſes, he who ſows the corn ſhall have the emblements, in others not.

Com. Dig. tit. Biens (G. 2.) If tenant in fee, or in tail, or in dower, die after ſowing the corn, and before ſeverance, his executor or adminiſtrator generally ſhall have the emblements.

Ibid. 122. Tenant for life or his repreſentatives ſhall not be prejudiced by any ſudden determination of his eſtate; becauſe ſuch a determination is contingent and uncertain.—Therefore if a tenant for his own life ſows the land, and dies before harveſt, his executors ſhall have the emblements or profits of the crop; for the eſtate was determined by the act of God, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The repreſentatives therefore of the tenant for life ſhall have the emblements, to compenſate for the labour and expence of tilling, manuring, and ſowing the lands; and alſo for the encouragement of huſbandry, which being a public benefit, tending to the encreaſe and plenty of proviſions, ought to have the utmoſt ſecurity and privilege that the law can give it.

Cro. Eliz. [464.] Therefore if a man ſows land and lets it for life, and the leſſee for life die before the corn be ſevered, his executor ſhall not have the emblements, but he in reverſion; but if he himſelf had ſowed the land and died, it were otherwiſe.

Ibid. So, if tenant for life ſows the land, and grants over his eſtate, the grantee dies before the corn ſevered, ſuch grantee's executor ſhall not have the corn.

Ibid. [463.] So, if the leſſee of a tenant for life be diſſeiſed, and the leſſee of a diſſeiſor ſows the land, and then the tenant for life

life dies, and he in remainder enters, yet he ſhall not have the emblements, but the leſſee of the tenant for life.

So it is alſo, if a man be tenant for the life of another, and *ceſtui que vie*, or he on whoſe life the land is held, dies after the corn ſown, the tenant *pur auter vie* ſhall have the emblements. *Ibid.* 123.

The ſame is alſo the rule, if a life eſtate be determined by the act of law. *Ibid.*

Therefore if a leaſe be made to huſband and wife during coverture (which gives them a determinable eſtate for life) and the huſband ſows the land, and afterwards they are divorced *a vinculo matrimonii*, the huſband ſhall have the emblements in this caſe; for the ſentence of divorce is the act of law.

So if tenant in tail give or grant his emblements of corn growing on the ground; the donee may cut and take them after the death of the tenant in tail. Shep. Touch. 244.

So every one who has an uncertain eſtate or intereſt, if before ſeverance of the corn, his eſtate determine either by the act of God or of the law, he ſhall have the emblements, or they ſhall go to his executor or adminiſtrator: for, ſo it is in all caſes regularly, where a man ſows land whereof and wherein he hath ſuch an eſtate as may perhaps continue until the corn be ripe. *Ibid.* Shep. Touch. 471.

But if the eſtate be determined by the tenant's own act, as by forfeiture by tenant for life for waſte committed; or if a tenant during widowhood marries; in theſe and ſimilar caſes, the tenants having thus determined the eſtates by their own acts, ſhall not be entitled to take the emblements. 2 Bl. Com. 123.

The under-tenants or leſſees of tenants for life, have the ſame, nay greater, indulgences, than their leſſors, the original tenants for life. The ſame; for the law of eſtovers and emblements, with regard to the tenant for life, is alſo law with regard to his under-tenant, who repreſents him and ſtands in his place:—Greater; for in thoſe caſes where tenant for life ſhall not have the emblements becauſe the eſtate determines by his own act, the exception ſhall not reach his leſſee who is a third perſon: thus, in the caſe of a woman who holds *durante viduitate*; her taking huſband is her own act, and therefore deprives her of the emblements, which *Ibid.* Cro. Eliz 460.

which, if ſhe be a feme copyholder, the lord ſhall have; but if ſhe leaſes her eſtate to an under-tenant, who ſows the land, and ſhe then marries, this her act ſhall not deprive the tenant of his emblements, who is a ſtranger and could not prevent her.

2 Bl Com. 145. With regard to emblements or the profits of lands ſowed by tenant for years, there is this difference between him and tenant for life: that where the term of tenant for years depends upon a certainty, (as if he holds from *Midſummer* for ten years,) and in the laſt year he ſows a crop of corn, and it is not ripe, and cut before *Midſummer*, the end of his term, his landlord ſhall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to 1 Lit. Abr. 511. ſow that of which he never could reap the profits. In ſuch caſe the landlord, it is ſaid, muſt enter on the lands to take the emblements.

2 Bl. Com. 145. But where the leaſe for years depends upon an uncertainty; as upon the death of the leſſor, being himſelf only tenant for life, or being a huſband ſeiſed in right of his wife; or if the term of years be determinable upon a life or lives; in all caſes of this kind, the eſtate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, ſhall have the emblements in the ſame manner that a tenant for life would be entitled thereto.

Ibid. Not ſo, however, if it determine by the act of the party himſelf: as if tenant for years ſurrenders before ſeverance, or does any thing that amounts to a forfeiture; in which caſe the emblements ſhall go to the leſſor, and not to the leſſee, who hath determined his eſtate by his own default.

Co. Lit. 55. *a.* n. 5. If however, leſſor covenants that leſſee for years ſhall have the emblements which are growing at the end of the term, there the property of the corn is well transferred to the leſſee, though it be not ſevered during the term.

Co. Lit. 55. *a.* 2 Bl. Com. 146. If tenant at will ſows his land, and the landlord before the corn is ripe, or before it is reaped, put him out, yet the tenant ſhall have the emblements, and free ingreſs, egreſs, and regreſs, to cut and carry away the profits: and this for the ſame reaſon upon which all the caſes of emblements turn; namely, the point of uncertainty: ſince the tenant

tenant could not poſſibly know when his landlord would determine his will, and therefore could make no proviſion againſt it; and having ſown the land, which is for the good of the public, upon a reaſonable preſumption, the law will not ſuffer him to be a loſer by it.

But it is otherwiſe, and upon reaſon equally good, where the tenant himſelf determines his will; for in this caſe the landlord ſhall have the profits of the land. *Ibid.*

So in the caſe of entry of the leſſor before ſowing, the leſſee at will ſhall not have the coſts of ploughing and manuring. Co. Lit. 55. a. 4.

A. lets lands to *B.* for ninety-nine years determinable on his life, with a proviſo of re-entry if let to tillage without licence; *C.* under-tenant ploughs and ſows in the life-time of *B.* who dies, no re-entry being made: the proviſo was gone, for it could only operate during the continuance of the leaſe; when that was determined, the proviſo was vaniſhed and gone; and *A.* having never been in poſſeſſion by right of re-entry for the condition broken, can have no advantage thereof; and he who ploughed and ſowed the land, has, in law and juſtice, a right to reap and take the emblements. 3 Wilſ. 140.

If a huſband holds lands for life, in right of his wife, and ſows the land, and afterwards ſhe dies before ſeverance, he ſhall have the emblements. 1 Nals. Abr. 701.

So where the wife has an eſtate for years, life, or in fee, and the huſband ſows the land and dies, his executors ſhall have the corn. *Ibid.* 702.

But if the huſband and wife are joint-tenants, though the huſband ſow the land with corn and die before it be ripe, the wife, and not his executors, ſhall have the corn, ſhe being the ſurviving joint-tenant. Co. Lit. 55. b. Cro. Eliz. 61.

If a widow is endowed with lands ſown, ſhe ſhall have the emblements, and not the heir: and a tenant in dower may diſpoſe of corn ſown on the ground; or it may go to her executors, if ſhe die before ſeverance. 2 Inſt. 80, 81.

One ſeiſed in fee of land dies, leaving a daughter, and his wife *privement enſeint* with a ſon; the daughter enters and ſows the land, and before ſeverance, the ſon is born; in Co. Lit. 55. b.

this

this caſe, the daughter ſhall have the corn, her eſtate being lawful, and defeated by the act of God, and it is for the public good that the land ſhould be ſown.

Ibid. If tenant by ſtatute-merchant ſows the land, and before ſeverance a ſudden and caſual profit happens, by which he is ſatisfied, yet he ſhall have the emblements.

2 Leon. 54. Where lands ſown are delivered in execution upon an extent, the perſon to whom they are ſo delivered ſhall have the corn on the ground.

2 Bulſt. 213. So, where judgment was given againſt a perſon, and then he ſowed the land, and brought a writ of error to reverſe the judgment, but it was affirmed; it was adjudged that the recoveror ſhould have the corn.

Co. Lit. 55. *b.* If a man enter by title paramount, he ſhall have the emblements: as if a diſſeiſor ſow and the diſſeiſee enter before ſeverance.

2 Bl. Com. 123. The advantages alſo of emblements are particularly extended to the parochial clergy by the ſtat. 28 *H.* 8. *c.* 11. which conſiders all perſons who are preſented to any eccleſiaſtical benefice, or to any civil office, as tenants for their own lives, unleſs the contrary be expreſſed in the form of the donation. By this ſtatute if a parſon ſows his glebe and dies, his executors ſhall have the corn; and ſuch parſon may by will diſpoſe thereof.

Co. Lit. 55. *a*, n. 1. *A.* grants to *B.* that he may ſow *A's.* land, which is done accordingly; yet *A.* ſhall have the emblements, becauſe *B.* hath not an intereſt.

When a man ſeiſed of land in fee or in tail ſows it and dies without will, it is ſaid that it goes to the executor, [adminiſtrator] and not to the heir, [*Tamen quære de hoc?* unleſs indeed it be meaned that the corn is ſevered.]

If a perſon deviſes his lands ſown, and ſays nothing of the corn, the corn ſhall go with the land to the deviſee.

Cro. Eliz. 61, [464.] One ſeiſed in fee-ſimple ſows land, and then deviſes the land by will and dies before ſeverance; the deviſee ſhall have the corn, and not the deviſor's executors.

Ibid. So, the remainder-man for life ſhall have the emblements ſown by the deviſor in fee, in preference to the executor of the tenant for life.

Where

Where there is a right to emblements, ingreſs, egreſs, and regreſs are allowed by law, in order to enter, cut and carry them away when the eſtate is determined. 1 Inſt. 56.

If the leſſee of a tenant for life be diſſeiſed, and the leſſee of the diſſeiſor ſow the land, and then the tenant for life dies, and he in remainder enters, yet he ſhall not have the emblements, but the leſſee of the tenant for life: for *quicquid plantatur ſolo, ſolo credit.* Cro. Eliz. (463)

Emblements are diſtinct from the real eſtate in the land, and ſubject to many, though not all, the incidents attending perſonal chattels: they were deviſeable by teſtament before the ſtatute of Wills, and at the death of the owner, ſhall veſt in his executor, and not his heir; they are forfeitable by outlawry in a perſonal action; and by the ſtat. 11 *G.* 2. *c.* 19. (though not by the common law) they may be diſtrained for rent arrear. 2 Bl. Com. 404.

But though emblements are aſſets in the hands of the executor, are forfeitable upon outlawry, and diſtrainable for rent, they are not in other reſpects conſidered as perſonal chattels, and particularly they are not the object of larceny before they are ſevered from the ground. *Ibid.*

Of Gleaning.

It may perhaps be as well to introduce here a word reſpecting gleaning or leaſing. An idea very univerſally prevails among the lower claſſes of the community that they have a right to glean, that is, to take from off the land the corn that remains thereon after the harveſt has been gotten in; than which notion nothing can be more erroneous. By particular cuſtom ſuch a right may poſſibly in ſome particular places exiſt; and the laudable kindneſs of tenants generally induces them to permit the poor to collect the corn they have left upon the land, and to appropriate it to their own uſe. As a right however it has no more exiſtence than a right to take the tenant's furniture from out of his meſſuage, and the pillage in the one caſe is as much a felony as the plunder would be in the other: for the act is not ſimply a treſpaſs, but a felony; and the compiler well remembers a conviction at the Old Bailey on an indictment found for the exerciſe of this ſuppoſed right. The parties were tried before Mr. Juſtice *Rooke*, (if he miſtake not) about three years ago. See alſo 4 *Bur.* 1926, 1 *T. R.* 462.

CHAPTER X.

Of the general Incidents to Leaſes (continued.)

SECTION I. *Of implied Covenants and Agreements.*

SECTION II. *Of expreſs Covenants and Agreements.*

SECTION I. *Of implied Covenants and Agreements.*

Bac. Abr. tit. Covenant.

COVENANT, contract, and agreement, is often uſed as ſynonymous words, ſignifying an engagement entered into, by which one perſon lays himſelf under an obligation to do ſomething beneficial to, or to abſtain from an act which, if done, would be prejudicial to another.

A covenant is either implied or expreſſed, it ſubſiſts either in law or in fact.

An implied covenant, or a covenant in law, is that which the law intends and implies, though it be not expreſſed by words in the deed.

For quiet Enjoyment. Shep. Touch. 160.

Thus, when one makes a leaſe for years by the words "demiſe and grant," without any expreſs covenant for quiet enjoyment; in this caſe, the law intends and makes ſuch a covenant on the part of the leſſor, which is, that the leſſee ſhall quietly hold and enjoy the thing demiſed againſt all perſons, at leaſt, having title under the leſſor, and at leaſt during the leſſor's life, and (as ſome think 1 *Inſt.* 384.) during the whole term: and hereupon an action of covenant may be brought againſt him in the reverſion; ſo that if the heir that is in by deſcent put out the termor of his father, the termor may have this action againſt him.—But if the party ouſting the covenantee has no title, the covenantee cannot, where the covenant is created by law, bring an action of covenant: [but he may maintain treſpaſs.]

2 Brownl. 161. Cro. Eliz. 214.

Shep. Touch. 167.

But though ſuch covenant in law is general againſt all perſons that have title during the term, and extends to the heir

heir after the death of the leſſor, as againſt himſelf only, and ſhall charge the executors or adminiſtrators for any diſturbance in the life of the covenantor, yet it ſhall not charge them for any diſturbance afterwards: [but ſee 1 *Inſt.* 384.] he that ſues therefore upon this covenant muſt ſhew that he was moleſted or evicted by one that had an elder title.

An implied covenant for quiet enjoyment, comprehends a covenant by implication that the leaſe ſhall be valid and not void or voidable; for of ſuch there could of courſe be no enjoyment at all.

To cultivate the Land.

A covenant is implied alſo, on the part of the leſſee that he will uſe the land demiſed to him in a huſbandmanlike manner and not unneceſſarily exhauſt the ſoil by neglectful or improper tillage.

Keep Meſſuage &c. in Repair. 2 Atk. 383.

So, in caſe of a houſe or other tenement a covenant is implied that the tenant will keep it in repair: a tenant for life therefore ſhall be obliged to keep the tenant's houſes on the eſtate in repair, even though he be ſuch without impeachment of waſte: and ſuch is the caſe even with reſpect to a tenant at will; for the tenant ought in juſtice to reſtore the premiſſes in as good a plight as they can be, conſiſtent with ſuch deterioration as is unavoidable.

11 Mod. 8.

It has been held that if a man has an upper-room in a houſe, an action would lie againſt him to compel him to repair his roof; and ſo, where a man has a ground-room, that they over him might have an action to compel him to keep up and maintain his foundation: but this ſeems to be erroneous; there is indeed, a writ in *Nat. Brev.* 127, to a mayor, to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof; but that was grounded on a cuſtom.

6 Mod. 314.

Payment of Rent.

As in every contract, there muſt be a legal conſideration to make it valid, ſo where the relation of landlord and tenant ſubſiſts, ſome *quid pro quo* muſt ſubſiſt alſo. Therefore, unleſs the leaſe be granted in conſideration of a fine or a ſum in groſs, an implied contract is raiſed on the part of the tenant that he ſhall pay an annual rent.

Shep. Touch. 161.

Theſe implied covenants are ſaid to be inherent, that is ſuch as pertain eſpecially to the land; as that the thing itſelf ſhall be quietly enjoyed, ſhall be kept in reparation,

and ſhall not be aliened; or to pay rent, not to cut down timber trees, or to do waſte; to fence the coppices when they be new cut and the like.

4 Co. 80. 1 Saund. 60. An implied covenant is in all caſes controuled within the limits of an expreſs covenant; for *expreſſum facit ceſſare tacitum.*

Bac. Abr. tit. Covenant (B.) Cro. Eliz. 674. Thus for example, with reſpect to the covenant for quiet enjoyment; if a man leaſes for years by the words "I have "demiſed, *&c.*" and the leſſor covenants that the leſſee ſhall enjoy during the term without eviction by the leſſor, or any claiming under him; this expreſs covenant qualifies the generality of the covenant in law and reſtrains it by the mutual conſent of both parties, that it ſhall not extend farther than the expreſs covenant.

Caution, therefore, is to be uſed in introducing into a leaſe expreſs covenants in certain caſes; as the evil intended to be guarded againſt, may frequently be prevented or recompenſed in a more limited degree, by an expreſs, than an implied covenant.

3 Bur. 1639. The diſtinction between implied covenants by operation of law, and expreſs covenants, is that expreſs covenants are to be taken more ſtrictly.

1 Eſp. N. P. 281. If a bond is for performance of covenants, it is forfeited by a breach of a covenant in law; as if the leſſee be evicted out of the premiſſes demiſed.

Palm. 364. 1 Eſp. N. P. 3. Where the plaintiff paid money to the defendant, on the defendant's promiſe to make him a leaſe of land, and before the leaſe made the defendant was evicted, the plaintiff recovered the money in this action, the conſideration not having been performed.

SECTION II. *Of expreſs Covenants.*

Covenants. 2 T. R. 137. The general principle is clear, that the landlord having the *jus diſponendi*, may annex whatever conditions he pleaſes to his grant, provided they be not illegal or unreaſonable.

Shep. Touch. 160. An expreſs covenant is the agreement or conſent of two or more by deed in writing, ſealed and delivered, whereby either of the parties promiſes the other that ſomething is done already, or ſhall be done afterwards. He that makes the

the covenant is called the covenantor, and he to whom it is made the covenantee.

No particular technical words are requiſite towards making a covenant; for any words, it ſeems, which ſhew the parties concurrence to the performance of a future act, will ſuffice for that purpoſe; as "yielding and paying," *&c.* 1 Bur. 290. 2 Mod. 92.

Thus if leſſee covenants to repair, "provided always and "it is agreed, that the leſſor ſhall find great timber, *&c.*" this makes a covenant on the part of the leſſor to find great timber, by the word "agreed," and it ſhall not be a qualification of the covenant of the leſſee; but without this word, it would have been only a qualification of the covenant of the leſſee. Bac. Abr. tit. Covenant (A.) & n. c.

Covenants are either real or perſonal.—Covenants real, or ſuch as are annexed to eſtates, ſhall deſcend to the heirs of the covenantee, and he alone ſhall take advantage of them; and ſuch covenants are ſaid to run with the land, ſo that he that hath the one, is ſubject to the other; for which reaſon warranties were called real covenants.—Covenants perſonal, are ſuch whereof ſome perſon in particular ſhall have the benefit, or whereby he ſhall be charged; as when a man covenants to do any perſonal thing, as to build, or repair a houſe, *&c.* or the like. *Ibid.* (E. 2.)] Shep. Touch. 161.

As to the conſtruction of covenants, all contracts are to be taken according to the intent of the parties, expreſſed by their own words, and if there be any doubt in the ſenſe of the words, ſuch conſtruction ſhall be made as is moſt ſtrong againſt the covenantor; leſt by the obſcure wording of his contract he ſhould find means to evade and elude it. Bac. Abr. tit. Covenant (F)

So tenant by the curteſy, in tail after poſſibility of iſſue extinct, in dower, for life, for years, by ſtatute or elegit, guardian, *&c.* hold their eſtates ſubject to a condition in law; ſo that if either of them alien his land in fee, or claim a greater eſtate in a court of record than his own, he forfeits his eſtate, and he in remainder or reverſion may enter; and if ſuch tenant do waſte, he in reverſion ſhall recover the place waſted. Shep. Touch. 125.

A condition ſignifies ſome quality annexed to a real eſtate by virtue of which it may be defeated, enlarged, or created upon an uncertain event. Alſo qualities annexed to *Of Conditions.* *Ibid.* tit. Conditions.

perſonal contracts and agreements are frequently called conditions; and theſe, as well as covenants, muſt likewiſe be interpreted according to the real intention of the parties, *&c.*

They are moſt properly created by inſerting the very word "condition" or the words on "condition;" but the word commonly and as effectually made uſe of is that of "provided;" wherefore a condition, and a proviſo, are ſynonymous terms.

Shep. Touch. 122. But if a proviſo or condition have dependance upon another clauſe of the deed, or be the words of the leſſee, to compel the leſſor to do ſomething, then it is not a condition, but a covenant only; as if there be in the deed a covenant that the leſſee ſhall ſcour the ditches, and then theſe words follow "provided that the leſſor ſhall carry away "the earth."

Ibid. If the words run thus: "provided always, and the leſſee, "*&c.* doth covenant, *&c.* that neither he nor his heirs ſhall "do ſuch an act;" this is both a condition and a covenant.

Co. Lit. 203. *b.* If a man makes a leaſe for years by indenture "provided "always and it is covenanted and agreed between the "parties, that the leſſee ſhall not alien," this is both a condition and a covenant; for it was adjudged that this was a condition by force of the proviſo, and a covenant by force of the other words.

Bac. Abr. tit. Conditions (G.) If a man leaſes for years, rendering rent, and the leſſee covenants to repair, *&c.* and afterwards the leſſor deviſes to the leſſee for more years, yielding the like rent, and under ſuch covenants as were in the firſt leaſe, yet this makes no condition; for though after the firſt leaſe is ended, the leſſee ſhall not be bound by the covenants, yet the will expreſſing that the leſſee ſhould have the lands, obſerving the firſt covenants, it ſhall not be taken to be a condition by any intent to be collected out of the will; for covenants and conditions differ much.

Cro. Eliz. 242. With reſpect to what ſhall be deemed a condition, it is a rule in proviſoes, that where a proviſo is that the leſſee ſhall perform or not perform a thing, and no penalty be annexed

nexed to it, that is a condition, otherwiſe it would be void; but if a penalty is annexed, it is a covenant.

A condition may be annexed to an eſtate of inheritance, freehold, or for years; or to a grant of tithes by the clergy. Com. Dig. tit. Conditions (A. 7.)

So, eſtates made by deed to infants, and feme coverts, upon condition, ſhall bind them becauſe the charge is on the land. 2 Danv. 30.

But a condition ſhall not be conſtrued to extend to things of common right, as if the condition be that one ſhall enjoy ſuch land immediately upon the grantor's death; though the executor takes the emblements, the condition does not extend to it. Com. Dig. tit. Condition (E.)

A leaſe for life on condition, being a freehold, cannot ceaſe without entry: but if it be a leaſe for years, the leaſe is void *ipſo facto* on breach of the condition, without any entry. 1 Inſt. 214.

As to what ſhall be a ſuſpenſion of a condition, if leſſee for years hath execution by *elegit* of a moiety of the rent and reverſion againſt the leſſor, where the leaſe is upon condition, this is a ſuſpenſion of all the condition during the time of the extent; and though but a moiety of the rent is extended, yet the entire condition is ſuſpended. So it is if a ſtranger hath execution by *elegit*. Bac. Abr. tit. Conditions (O. 3.)

A condition may be contained in the ſame deed; or indorſed upon the deed; or may be contained in another deed executed the ſame day. So a condition to defeat a deed may be annexed to the reſervation of the rent, explaining the manner of payment. Com. Dig. *ut ante.* (A. 9.)

Regularly, when any man will take advantage of a condition, if he may enter, he muſt enter, and when he cannot enter he muſt make a claim; and the reaſon is, that a freehold and inheritance ſhall not ceaſe without entry or claim, and alſo the grantor may waive the condition at his pleaſure. Co. Lit. 218. a.

It is laid down for a rule, generally, that he who enters for a condition broken ſhall be ſeiſed in his firſt eſtate, or of that eſtate which he had at the time of the eſtate made upon condition, and therefore ſhall avoid all meſne charges and incumbrances. Co. Lit. 202. Bac. Abr. tit. Conditions (O. 4.)

A proviſo or condition differs alſo from a covenant in

this, that a proviſo is in the words of, and binding upon both parties, whereas a covenant is in the words of the covenantor only.

Covenant for quiet Enjoyment.

An expreſs covenant, uſual on the part of the leſſor, is for quiet enjoyment of the premiſſes demiſed, or to ſave harmleſs the leſſee from all perſons claiming title.

Shep. Touch. 166.

If one make a leaſe of land to another, and covenant that he ſhall quietly enjoy it without the let or moleſtation of any perſon whatſoever, or without the let of any perſon whatſoever claiming by or under the leſſor; in both theſe caſes, the covenant, it is ſaid, ſhall be taken to extend to ſuch perſons as have title, or claim ſome eſtate under the leſſor; for if, in the firſt caſe, the leſſee ſhall be diſturbed by any claim, entry, or otherwiſe by any perſon that hath no title; or in the ſecond caſe, by any perſon that ſhall claim under another and hath title, or that ſhall claim under the leſſor, this is held to be no breach of the covenant.—*Sed quære* as to the firſt caſe; for herein ſome conceive a difference between a covenant in deed, and a covenant in law; and that howſoever the latter is extended only to evictions by title, yet that the covenant in deed ſhall not be extended further; therefore that if *A.* make a leaſe to *B.* and covenants that *B.* ſhall quietly enjoy it during the term without the interruption of any perſon or perſons, in ſuch caſe, if a ſtranger, having no right, interrupt *B.* he may have an action of covenant, as, when ſuch a promiſe is by word, an action on the caſe will lie upon it.

10 Mod. 384. 1 Com. R. 230. 1 T. R. 673.

A covenant that the leſſee ſhall quietly enjoy againſt all claiming, or pretending to claim, a right in the premiſſes, was held to extend to all interruptions, be the claim legal or not, provided it appear that the diſturber do not claim under the leſſee himſelf.

1 Eſp. N. P. 273.

It ſeems indeed to have been at one time held, that if the leſſor untertook expreſsly that the leſſee ſhould enjoy during the term "quietly, peaceably, and without interruption," it would extend as a covenant againſt all tortions ejectments whatſoever; but this doctrine is now overruled.

3 T. R. 584.

For, where a covenant was inſerted in a conveyance of lands in America, during the American war, that the grantor

tor had a legal title, and that the grantee might peaceably enjoy, *&c.* without let, interruption, *&c.* of the grantor and his heirs, " and of and from all and every other perſon " or perſons whomſoever," it was held not to be broken by the States of America ſeiſing the lands as forfeited for an act done previous to the conveyance, notwithſtanding the ſubſequent acknowledgment of her independence by this country; for ſuch a covenant does not extend to the acts of wrong doers, but only to perſons claiming title; and even a general warranty, which is conceived in terms more general than the preſent covenant, has been reſtrained to *lawful* interruptions. *Ibid.* 587.

So, if a leaſe be made for a term of years by deed, ſo that the leſſor is chargeable by writ of covenant, if a ſtranger who has no right ouſt that termor, yet he ſhall not have a writ of covenant againſt his leſſor; for a covenant for quiet enjoyment ſhall not be conſtrued to extend to a wrongful ejectment by a ſtranger, unleſs ſo expreſſed; becauſe for this wrong, the leſſee may have his remedy by action againſt the ſtranger himſelf. *Ibid. n. a.* 22 H. 6. 52. *b.* pl. 26. Cro. Eliz. 914. Cro. Jac. 425. Bull. N. P. 161.

But if he to whom the right belongs ouſt the termor, then he ſhall have covenant againſt the leſſor; ſo, if the leſſee be ejected by the leſſor himſelf. 3 T. R. 387. *n. a.* Cro. Eliz. 213.

So, if the leſſor covenants againſt the acts of a particular perſon or of particular perſons, covenant will lie. 1 Str. 400.

If a man covenant that he will not interrupt the covenantee in the enjoyment of a cloſe, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it. 8 Mod. 318.

If the leſſor covenants with the leſſee, that he hath not done any act to prejudice the leaſe, but that the leſſee ſhall enjoy it againſt all perſons; in this caſe, theſe words " againſt all perſons" ſhall refer to the firſt, and be limited and reſtrained to any acts done by him, and no breach ſhall be allowed but in ſuch an act. Shep. Touch. 167.

In a covenant that the leſſee ſhall quietly enjoy, *&c.* with an exception of the king, his heirs, and ſucceſſors, an interruption by the king's patentee is a breach of the covenant; for ſuch patentee is not excepted. Cro. Eliz. 518.

If

Ibid. 688. If a leſſee holds his eſtate on condition of paying an annuity, non-payment is a breach of covenant for quiet enjoyment, although no demand of it was made, and the leſſee himſelf might have paid it.

3 Salk. 108. But if a covenant be to ſave the leſſee harmleſs from a rent-charge, if the leſſee pay it without compulſion, he pays it in his own wrong.

4 Mod. 249. To covenant for enjoyment, free from arrears, a plea that the defendant delivered money to the plaintiff, with intention to pay it to the leſſor, is good.

A covenant for quiet enjoyment implies, of courſe, that the leaſe ſhall be a good and valid demiſe, as a bad leaſe would be a breach of ſuch covenant for the reaſons aſſigned before. This being the caſe, the old covenant, for farther aſſurance, becomes unneceſſary, and has therefore fallen into diſuſe.

Shep. Touch. 170.

1 T. R. 705. Under a power to tenant for life to leaſe for years, reſerving the uſual covenants, *&c.* a leaſe made by him, containing a proviſo that in caſe the premiſſes were blown down, or burned, the leſſor ſhould rebuild, otherwiſe the rent ſhould ceaſe, is void, the jury finding that ſuch covenant is uſual.

3 T. R. 665. So, under a power to a tenant in poſſeſſion to let all or any part of the premiſſes, ſo as the uſual rents be reſerved, a leaſe of tithes, which had never been let before, was held void.

In theſe and the like caſes, the leaſe being in fact a nullity, a covenant for quiet enjoyment is completely broken.

For payment of Rent. A covenant for the payment of the rent is alſo generally inſerted in the leaſe.

8 T. R. 61. The tenant's liability to pay rent ſubſiſts during the continuance of the leaſe, notwithſtanding he may become a bankrupt, and be deprived of all his property.

2 Str. 763. 1 Ld. Raym. 1477. *&c.* So, where the leſſee covenants generally to pay rent, he is bound to pay it though the houſe be burned down.

1 T. R. 310. 3 Bur. 1640. So, a leſſee who covenants to pay rent and to repair, with expreſs exception of caſualties by fire, is liable upon the covenant for rent though the premiſſes are burned down, and not rebuilt by the leſſor after notice; for whatever was the default of the leſſor in not repairing, and though

though it is a hard caſe, yet the leſſee muſt at all events perform his covenant, by which he was expreſsly bound to pay rent during the term.

The rule is, that when the law creates a duty, and the party is diſabled to perform it without any default in him, and he has no remedy over, the law will excuſe him: but when the party by his own contract creates a duty or charge upon himſelf, he is bound to make it good if he may, notwithſtanding any accident by inevitable neceſſity; becauſe he might have provided againſt it by his contract. 6 T. R. 751.

Of fore-hand Rents or Fines.

Another ſpecies of rent occurs, payment of which is generally ſtipulated by a covenant in the leaſe; and this is ſometimes called a forehand rent, and ſometimes a foregift or income, but more commonly a fine, which is a premium given by the leſſee on the renewal of his leaſe, and has been conſidered as an improved rent. 1 T. R. 486. 3 T. R. 461.

In the caſe of renewal of a leaſe, by an eccleſiaſtical corporation, though a dean and chapter are reaſonable in the fines they demand, if an accident delays the leaſe, which has not happened from their fault or that of the tenant, yet if it is not completed till a new member comes in, he ſhall have his proportion. 3 Atk. 473.

Nomine Poenæ.

A farther ſecurity for the payment of rent is ſometimes agreed upon, by the inſertion of a covenant, by the terms of which the leſſee forfeits a certain ſum upon non-payment of ſuch rent. This *nomine poenæ*, as it is called, is incident to the rent, and ſhall deſcend to the heir. If an annual rent, therefore, be deviſed, the grantee may have an action of debt for the arrearages thereof. Co. Lit. 61. *b.* Cro. Eliz. 895.

By accepting the rent, however, the party it ſhould ſeem waives the penalty. Cowp. 247.

If an annual rent be deviſed, the *nomine poenæ* paſſes as incident thereto, and action of debt will lie for the arrears. Cro. Eliz. 895. Lutw. 1156.

Though forfeiture is mentioned to be *nomine poenæ*, or for not paying a collateral ſum, it is no *nomine poenæ* if it be not of a rent.

A penalty of a ſimilar kind is alſo inſerted ſometimes in caſe the leſſee dig for bricks, or leſſen the quantity or value of the ſoil by ſimilar means. But a covenant of this nature (unleſs the penalty be ſufficiently great) is perhaps leſs expedient

pedient than the implied, or an expreſs one to uſe the land in an huſband-like manner, or than an expreſs one not to dig, *&c.* as damages could not be recovered beyond the amount of the penalty in the one caſe, whereas in the other caſes, the landlord would have a proſpect of being recompenſed to the extent of the injury done.

Doug. 49, 50.

Bac. Abr. tit. Conditions, (O. 2.)

If there be a *nomine poenæ* given to the leſſor for non-payment, the leſſor muſt demand the rent before he can be intitled to the penalty; or if the clauſe be, that if the rent were behind, the eſtate of the leſſee ſhould ceaſe and be void; in theſe caſes there muſt be an actual demand made; becauſe the preſumption is, that the leſſee is attendant on the land to ſave his penalty and preſerve his eſtate, and therefore ſhall not be puniſhed without a wilful default, and that cannot be made to appear without a demand be proved, and that it was not anſwered; and ſuch demand muſt be made at the day prefixed for the payment, and alleged expreſsly to have been made in the pleading.—The action of ejectment is now the uſual mode adopted for taking advantage of the tenant's default, in which he can only plead the general iſſue; but the leſſor of the plaintiff muſt be prepared to prove a demand, where a demand is abſolutely neceſſary.

1 Com. R. 180.

When one covenants with another that he ſhall have lands diſcharged of all rents, the covenantee ought to be diſcharged of a quit rent.

Bond for performance of Covenants.

3 Co. 78. *a.*
2 Eſp. N. P. 281.

If a man covenants to enter into a bond to the leſſee for the enjoyment of certain lands demiſed, and does not expreſs what the ſum ſhall be, he ſhall be bound in ſuch a ſum as is equal to the value of the land.

Doug. 49. 50.

A bond for the performance of covenants or agreements is only a ſecurity (under ſtat. 8 & 9 *W.* 3. *c.* 11.) to the extent of the penalty.

Covenant to pay Taxes.

With reſpect to taxes, the tenant commonly covenants to pay all public impoſitions, except the land-tax.

Doug. 624.

A grantee of a fee-farm-rent, "without any deduction, "defalcation, or abatement whatſoever," is entitled to the full rent without deducting the land-tax.

1 Ld. Raym. 320.

So, if a tenant covenant to pay a rent without deducting taxes, a ſtatute, authoriſing the tenants to deduct, will not repeal the covenant.

A cove-

A covenant to pay taxes generally, includes parliamentary taxes, and, as a conſequence, the land-tax; for when "taxes" are generally ſpoken of, if the ſubject matter will bear it, they ſhall be intended parliamentary taxes given by the crown. Doug. 624. 615. 12 Mod. 55. 168. 11 Mod. 238.

So, if a leaſe be made for years, rendering rent free and clear from all manner of taxes, charges, and impoſitions whatſoever, the leſſee is bound to pay the whole rent without any manner of deduction for any old or new tax, charge, or impoſition whatſoever. Bac. Abr. tit. Covenant (F.) Carth. 135. Doug. 624.

If a tenant covenant to pay "all taxes," this binds him to the payment of ſuch taxes only as were in being when the leaſe was made, and not to taxes or charges afterwards impoſed. 1 Vent. 223.

So, a covenant to diſcharge from taxes extends to ſubſequent taxes of the ſame nature, but not to thoſe of a different nature. 1 Salk. 198. 3 T. R. 461.

A covenant to pay taxes on the land does not extend to the rates to church and poor, for they are perſonal charges. 8 Mod. 314.

Covenants relative to this ſubject are generally inſerted in leaſes, and are authoriſed by the land-tax acts, which provide "that nothing therein contained ſhall be conſtrued to alter, change, determine, or make void any "contracts, covenants, or agreements whatſoever, between "landlord and tenant, or any other perſons, touching the "payment of taxes and aſſeſſments."

Where land was mortgaged to ſecure an annual payment of 20 *l.* to a widow, in ſatisfaction of her dower, this annual payment being ſecured out of land ought to anſwer taxes as the land does; but if the tenant in the payment of the annuity to the widow omits to deduct for taxes, he ſhall not make her refund in equity; [but it may be recovered at law in an action of *aſſumpſit*.] 3 P. Wms. 128. *n.*

On a covenant that a mortgagee ſhall have the benefit of pre-emption, equity will not interpoſe if it be not inſiſted on until after the eſtate be ſold. 9 Mod. 2.

To repair.

As to an expreſs covenant to repair, if a leſſee covenants to keep a houſe in repair, and leave it in as good plight as it Fitz. Abr. tit. Covenant, fol 4.

it was at the time of making the leaſe; in this caſe, the ordinary and natural decay is no breach of the covenant, but the leſſor is bound to do his beſt to keep it in the ſame plight, and therefore ſhould keep it covered.

2 El. Rep. 842. An agreement by the tenant to leave a farm as he found it, is an agreement to leave it in tenantable repair; and will maintain a declaration ſo laid.

1 Eſp. N.P. 277. A general covenant to repair, and to deliver up in repair, extends, it ſeems, to all buildings erected during the term.

Bac. Abr. tit. Covenant (F.) Therefore where a leaſe was made of three meſſuages for forty-one years, in which the leſſee covenanted "to pull "them down and erect three other in their place, and alſo "to leave the ſaid premiſſes and houſes thereafter to be "erected at the end of the term in good repair;" and afterwards the leſſee pulls down the three houſes and builds five; he muſt leave them all in good repair at the end of the term: for though by the firſt covenant he is bound only to repair the meſſuages agreed to be erected, yet by the laſt covenant he is obliged to leave in good repair the houſes thereafter to be erected indefinitely, which extends to all houſes that ſhall be built upon the premiſſes during the term.

Ibid. So, if a man takes a leaſe of a houſe and land, and covenants to leave the demiſed premiſſes in good repair at the end of the term, and he erects a meſſuage upon part of the land, beſides what was before; he muſt keep, or leave this in good repair alſo.

1 Bur. 290, 291. But in a building and repairing leaſe, a covenant "to "leave the demiſed premiſſes, with all new erections, well "repaired," was conſtrued to extend to the new erections only; a ſum of money being agreed to be laid out in new erections and rebuilding, and the covenant "to keep in re-"pair" extending only to new erections.

Accidental Fire. 2 Com. Rep. 627. 6 T. R. 650. Dyer, 33. 2 Show. 401. A leſſee of a houſe, who covenants generally to repair, is bound to rebuild it, if it be burned by accidental fire: ſo, if the premiſſes be conſumed by lightning or the King's enemies, he is ſtill liable.

Co. Lit. 57. a. n. 1. Touching the progreſs of the law as to the accidental burning

burning of houſes, ſo far as regards landlord and tenant: at common law leſſees were not anſwerable to landlords for accidental or negligent burning; then came the ſtatute of *Glouceſter*, which by making tenants for life and years liable to waſte without any exception, conſequently rendered them anſwerable for deſtruction by fire: thus ſtood the law in Lord *Coke*'s time.

But now by the ſtat. 6 *Annæ*, *c.* 31. the antient law is reſtored, and the diſtinction introduced by the ſtatute of *Glouceſter* between tenants at will and other leſſees is taken away: for by the 6th ſection of that ſtatute it is enacted, That no action, ſuit, or proceſs whatſoever ſhall be had, maintained, or proſecuted againſt any perſon in whoſe houſe or chamber any fire ſhall accidentally begin, or any recompence be made by ſuch perſon for any damage ſuffered or occaſioned thereby: and if any action ſhall be brought, the defendant may plead the general iſſue and give the act in evidence; and in caſe the plaintiff become nonſuit, or diſcontinue his action or ſuit, or if a verdict paſs againſt him, the defendant ſhall recover treble coſts. Section 7. provides, That nothing in the act contained ſhall extend to defeat or make void any contract or agreement between landlord and tenant.

An exception of accidents by fire is now in many caſes introduced into leaſes to protect the leſſee, who would (as we have ſeen) be liable to rebuild under his covenant to repair. 6 T. R. 651.

But though ſuch exception will protect the leſſee from his covenant to repair, yet he is liable (as we have alſo ſeen) to payment under a covenant to pay rent, though the premiſſes be burnt down and not rebuilt by the leſſor, by which he is deprived of all uſe and enjoyment of them. 1 T. R. 310. *ante*, p. 234.

When there is a covenant to repair on the part of the leſſee, if he pull down houſes, no action will lie againſt him till the end of the term, for before that period he may repair them. But if he cut down timber or trees, covenant lies immediately, for ſuch cannot be replaced in the ſame plight at the end of the term. F. N. B. 145. K.

If the covenant be, "it is agreed that the leſſee ſhall "keep the houſe demiſed in good repair, the leſſor putting "it 1 Eſp. N. P. 178.

" it in good repair," covenant lies againſt the leſſor on theſe words, if he do not put it into repair.

1 Leon. 237. Cro. Eliz. 222. 1 Ld. Raym. 420. 9 Mod. 60.

It has been held, that if the leſſor covenant to repair during the term, if he will not do it, the leſſee may repair and pay himſelf by way of retainer: but *Holt* C. J. doubted of this, unleſs there was a covenant to deduct the expence of the repairs from the rent: and though caſes occur in the books, wherein it has been thought by ſome of the Judges that a leſſee might expend part of the rent in repairs of the premiſſes if they required repair, and might ſet-off ſuch expenditure in an action either of debt or covenant for rent; yet ſuch an opinion is erroneous, for the leſſor and leſſee have their reſpective remedies on the ſeveral covenants contained in the leaſe.

Bull. N. P. 176, 7.

So that the point ſeems to be now ſettled; for upon a plea of *nil debet* in an action of debt for rent, the defendant cannot give in evidence diſburſements for neceſſary repairs, for he might have had covenant againſt him.

1 Salk. 317.

A covenant to repair is a covenant that muſt run with the land, for it affects the eſtate of the term, and the reverſion in the hands of any perſon that has it.

Entry by Leſſor.

Bull. N. P. 165.

Entry by the leſſor into the back-yard of a meſſuage does not ſuſpend the covenants to repair, as the leſſee is ſtill in poſſeſſion of the meſſuage.

Cro. Eliz. 374.

Neither does the entry of a leſſor excuſe a leſſee from the performance of a collateral covenant.

Therefore where leſſee for years, who covenanted to drain ſuch water out of land before ſuch a day, pleads that before the day the leſſor entered and continued in poſſeſſion until after the day; on demurrer it was adjudged to be no plea, becauſe it is a collateral act to be done by him; unleſs he had ſaid that the leſſor held him out, and diſturbed him to do it.

Covenant to cultivate the Land.

In huſbandry leaſes it is uſual to inſert a ſpecial covenant, as to the mode of cultivation; for without ſuch a covenant, the leſſee would be left to his choice as to the treatment of the land; provided he break not the implied covenant to treat it in a huſbandmanlike manner.

1 Eſp. N. P. 279.

Reſpecting a covenant to uſe the land in a huſbandmanlike manner and to deliver it up in like condition, it was held

to

to be matter of law to determine what was uſing the land in an huſbandman-like manner, and *Buller* J. gave it as his opinion, that under ſuch a covenant the tenant ought to uſe on the land all the manure made there, except that when his time was out, he might carry away ſuch corn and ſtraw as had not been uſed there, and was not obliged to bring back the manure ariſing from it. [This is a covenant which we conceive would be governed in its conſtruction by the mode in which the land demiſed had been uſually cultivated, by the nature of the ſoil, and by the cuſtom of the country.]

Not to permit particular Trades to be carried on in the Houſe. 2 T. R. 141.

In leaſes of tenements, eſpecially in towns, a covenant is frequently inſerted to reſtrain the leſſee from carrying on, or aſſigning the houſes to perſons carrying on obnoxious trades, and alſo from having or permitting any ſale of furniture in the houſe: a precaution which becomes very neceſſary not merely from the injury which may otherwiſe be done to the premiſſes, but likewiſe from their reſpectability being leſſened and the good-will of them being thereby diminiſhed.

Bac. Abr. tit. Condition (O.)

If the leſſee of a houſe covenants not to leaſe the ſhop, yard, or other thing belonging to the houſe, to one who ſells coals, nor that he himſelf will ſell coals there, and afterwards he leaſes all the houſe to one who ſells coals, he has broken the condition.

Schedule of the Goods. Bac. Abr. tit. Covenant (B.)

In caſe of the leaſe of a houſe, together with the goods, it is uſual (as we have before mentioned) to make a ſchedule thereof and affix it to the leaſe, and to have a covenant from the leſſee to re-deliver them at the end of the term; for without ſuch covenant the leſſor can have no remedy but trover or detinue for them after the leaſe is ended: for as the law does not create any covenant upon ſuch perſonal things, an expreſs covenant becomes neceſſary.

Covenant not to aſſign. 2 T. R. 138.

A covenant not to aſſign, and a proviſo of re-entry in caſe the leſſee do aſſign, are generally contained in leaſes. The landlord relies perhaps on the tenant's honeſty; or he approves of his ſkill in farming, and thinks that he will take more care of the farm than another; and therefore he has a right to guard againſt the event of the eſtate's falling into the hands of any other perſon, who may not manage it ſo well as the original tenant; indeed it is but reaſonable

that a landlord ſhould exerciſe his judgment with reſpect to the perſon to whom he truſts the management of his eſtate; a covenant, therefore, not to aſſign is legal, and covenants to that effect are frequently inſerted in leaſes.

1 Eſp. R. 8. Covenant not to aſſign or underlet, without leave of the leſſor firſt had and obtained, is a fair and uſual covenant.

Shep. Touch. 124. and *n.* 2. If a leſſee for years covenant, that if he, his executors, or aſſigns alien, it ſhall be lawful for the leſſor to re-enter; it ſeems this is a good condition, and not a covenant only; and the leſſor may take it as either a covenant or a condition, but not as both.

Cro. Eliz. 242. A clauſe in the leaſe in theſe words, Provided always and it is further covenanted, that the leſſee ſhall not aſſign his term to any other, except to the leſſor, paying as much as another, and that if the leſſor will not have it, then the leſſee may alien it to none except his mother or his ſon, was held to be a good condition to defeat the eſtate, for "pro-"vided always" implies a condition, if there be not words ſubſequent which may peradventure change it into a covenant; as where there is another penalty annexed to it for non-performance.

Cro. Car. 511. Cro. Eliz 572. If a leaſe contain a condition that the leſſee ſhall not aſſign without licenee, and the leſſor, after notice of the aſſignment without licence, accept of rent from the aſſignee, he diſpenſes with the condition.

Co. Lit. 215. *n.* For it is to be obſerved, that where the leaſe is *ipſo facto* void by the condition, no acceptance of rent after can make it have a continuance; otherwiſe it is of a leaſe voidable by entry: becauſe the acceptance of rent cannot make a new leaſe and the old one was determined; but the acceptance of rent in the latter caſe is a ſufficient declaration that it is the leſſor's will to continue the leaſe, for he is not entitled to the rent but by the leaſe.

Doug 50. Cowp. 482.

Cro. Eliz. 553. But the acceptance of rent after a condition broken, without notice of the breach, is not a continuance of the eſtate; except the condition be of ſuch a nature as to be equally within the conuſance of both leſſor and leſſee.

Bac. Abr tit. Conditions (O.) If a man leaſe a houſe and land, upon condition that the leſſee ſhall not parcel out the land, nor any part thereof from the houſe, and afterwards the leſſee leaſes the houſe

and

and part of the land to one, and leaſes the reſidue of the land to another; this is a breach of the condition; for by the word "parcelling" is intended a diviſion or ſeparation of the land from the houſe: it was therefore adjudged that the firſt grant was a breach of the condition, becauſe every diviſion and ſeverance of the houſe and land is within the words and intent of the condition. But if the leſſor afterwards accept of rent, it will bar his entry for the condition broken. Cro. Eliz. 528.

A leaſe for years was made, upon condition to be void if the leſſee aſſigned over the term; he afterwards made an aſſignment, and the leſſor, knowing it, accepted the rent: adjudged, that this would not make the leaſe good, becauſe it was abſolutely void before the acceptance. 1 Salk. 4.

Where the covenant was not to aſſign the whole or any part of the lands demiſed without the leſſor's conſent, and the leſſor entered into part himſelf, and then the leſſee aſſigned; this was held to be a breach of the covenant, notwithſtanding the leſſor's entry. Style, 265.

If the leſſee reſerves the rent to himſelf on granting over, it is an under-leaſe and not an aſſignment, though he parts with the whole term; for what cannot be ſupported as an aſſignment, ſhall be good as an under-leaſe againſt the party granting it. 1 Str. 405. *Sed vide* Doug. 187. and *poſt.* p. 255.

So where the covenant was "That the leſſee ſhould not "aſſign over his term without the leſſor's conſent firſt had "in writing," and the leſſee deviſed the term without any ſuch conſent obtained; this was held not to be ſuch an aſſignment as was a breach of the covenant. Style, 483.

But whether it would be ſo held at this day, may well be doubted. 2 T. R. 425.

If a leſſee for years covenant not to alien without licence of the leſſor, under penalty of forfeiting the leaſe, and he afterwards aliens without licence, equity will not relieve him. 9 Mod. 112.

But if a condition be to do ſuch an act, and the leſſor diſcharges him of part, the whole condition is deſtroyed; as if a condition be to plough his land, or build his houſe, and he diſcharges him of part. Com. Dig. tit. Condition (Q.)

So, where the leſſor licence his leſſee to alien part, he may alien the reſidue without licence; for the leſſor cannot Cro. Eliz. 816.

enter, becauſe if he ſhould enter for the condition, he ſhould enter upon the entire, as it was limited; and if he ſhould enter upon the entire, he would deſtroy that which he had licenſed to be aliened, which he cannot do.

Ibid. Indeed, on a proviſo that a leſſee and his aſſigns ſhall not alien without licence, if the leſſor give licence, the condition is entirely deſtroyed, and the aſſignee may afterwards aſſign or demiſe the whole or any part of the term without licence. But it is otherwiſe of a deviſe of the term, for that would have been a breach of the condition.

Com. Dig. tit. Condition (F.) So, a leaſe upon condition, that the leſſee or his aſſigns ſhall not alien, unleſs to his brother; if the leſſee aſſigns his term to his brother, *he* ſhall not be reſtrained by the condition.

Ibid. (Q.) But if a leaſe be upon condition to huſband and wife, that if it comes to any other hand than their own, and their iſſues, the leſſor ſhall re-enter; if the huſband dies and the wife takes another huſband, the leſſor ſhall re-enter; as it is ſaid.

Shep. Touch. 123. *in* I. If a leaſe be made to a man and his aſſigns for twenty-one years provided that he ſhall not aſſign, the proviſo being repugnant to the premiſes is void; but it would have been good, if the word "aſſigns" had been omitted.

2 T. R. 134. An aſſignment by operation of law is not, it ſhould ſeem, a breach of a general covenant of this nature: the landlord, therefore, does well to protect himſelf as far as he can by the particularity of the words contained in his covenant.

Ibid. 138. 140. Thus a proviſo in a leaſe that the landlord ſhall re-enter on the tenant's committing an act of bankruptcy whereon a commiſſion ſhall iſſue, is good; for it is a proviſo not contrary to any expreſs law, or to reaſon, or public policy; and the landlord in ſuch caſe parts with his term on account of his perſonal confidence in his tenant, which is manifeſtly the caſe in all leaſes where clauſes againſt alienation are inſerted.

2 Bl. Rep. 767. 3 Wilſ 235. *s. c.* Although conditions in reſtraint of alienation are legal and uſual, courts of law have always held a ſtrict hand over ſuch methods of defeating leaſes, and have countenanced very eaſy modes of putting an end to them.

Ibid. Therefore where the words of the condition were "That "the

" the leſſee, his executors or adminiſtrators, ſhall not at " any time or times during this demiſe, aſſign, transfer, or " ſet over, or otherwiſe do or put away this preſent inden- " ture of demiſe, or the premiſſes hereby demiſed, or any " part thereof;" it was held that this condition was not broken by an under-leaſe: for that " aſſign, transfer, and " ſet over," were mere words of aſſignment, whereas the preſent was an under-leaſe, [the words " demiſe over" were omitted in the proviſo;] and that deviſing a term, [ſee *Bac. Abr.* tit. *Conditions*, O.] or the leſſee becoming a bankrupt, or dying inteſtate, would be a " doing and putting " away the leaſe;" ſo being in debt, by confeſſing a judgment and having the term taken in execution, was the like; but that none of theſe amounted to a breach of this condition.

So, upon the principle of one of the grounds of adjudica- 8 T. R. 61.
tion in the preceding caſe, it has recently been held, that a leaſe taken in execution on a warrant of attorney to confeſs a judgment given by the leſſee, is not a forfeiture of the leaſe, under a covenant by ſuch leſſee " not to let, ſet, " aſſign, transfer, make over, barter, exchange, or other- " wiſe part with the indenture, *&c.*;" for a diſtinction is to be taken between thoſe acts which a party does voluntarily and thoſe that paſs *in invitum*; of which latter claſs is the one in queſtion.

But where it appears that the warrant was executed for *Ibid. s. c.* 300.
the expreſs purpoſe of getting poſſeſſion of the leaſe, the maxim applies, that that which cannot be done *per directum*, ſhall not be done *per obliquum*: in ſuch caſe, therefore, it being in fraud of the covenant; the landlord may, under a clauſe of re-entry for breach of the condition, recover the premiſſes in an action of ejectment from a purchaſer under the ſheriff's ſale.

So, alſo, if the leaſe contain a proviſo, that the leſſor, 2 T. R. 425.
his executors or adminiſtrators, ſhall not ſet, let, or aſſign over the whole or any part of the demiſed premiſſes without licence in writing on pain of forfeiting the leaſe, the adminiſtratrix of the leſſee cannot under-let without incurring a forfeiture. A parol licence to let part of the premiſſes does not diſcharge the leſſee from the reſtriction of ſuch a

proviſo: for as the party is charged by a ſufficient writing, ſo muſt he be diſcharged by a ſufficient writing, or ſomething of as high an authority, agreeable to the maxim *unum quodque diſſolvitur, eo ligamine quo ligatur.*

Condition to re-enter on non-payment of Rent.

Bac. on Leaſes, 220.

A condition that if the rent be behind by the ſpace of any given time after the day preſcribed for payment, the leſſor ſhall re-enter, is good; and ſuch condition is not ſaved by the attendance of the leſſee with the rent merely on the firſt day of payment, for if the leſſor be not then there to receive it, the leſſee muſt equally attend on the laſt day.

Ibid.

If a leaſe be made rendering rent, on condition, that if the rent be not paid within twenty days the leſſor ſhall re-enter, and the rent is not paid; in this caſe the condition is broken, but the leſſor cannot enter until he has made a legal demand; and if he die before he do it, his heir ſhall never take advantage of that breach, but is diſcharged for ever.

Shep. Touch. 148. *n.* 1.

A material difference ſubſiſts between a remedy by re-entry and a remedy by diſtreſs, for the non-payment of rent. Where the remedy is by way of re-entry for non-payment, an actual demand muſt be made previous to the entry, otherwiſe it is tortious, and treſpaſs would lie, becauſe a condition of re-entry is in derogation of the grant, and the eſtate at law, being once defeated, is not to be reſtored by any ſubſequent payment: but a notice of diſtreſs is of itſelf a demand.

Bac. Abr. tit. Conditions (O. 2.)

But where the power of re-entry is given to the leſſor for non-payment without any further demand, there it ſeems that the leſſee has undertaken to pay it, whether it be demanded or not, and no preſumption in his favour can ariſe in this caſe, becauſe, by diſpenſing with the demand, he has put himſelf under the neceſſity of making an actual proof that he was ready to tender and pay the rent. It would, however, be adviſeable for the leſſor even in this caſe to demand the rent, as the payment ſhould be on the land, provided no place is fixed for the purpoſe, and a tenant may be prepared to prove that he was on the land the day the rent became due, ready to pay.

Ibid.

Alſo as to the neceſſity of a demand of the rent, there is a difference between a condition and a limitation; for inſtance,

ſtance, if a tenant for life, (as the caſe was by marriage ſettlement, with power to make leaſes for twenty-one years, ſo long as the leſſee, his executors, or aſſigns ſhall duly pay the rent reſerved) makes a leaſe purſuant to the power, the tenant is at his peril obliged to pay the rent without any demand of the leſſor; becauſe the eſtate is limited to continue only ſo long as the rent is paid, and therefore, for the non-performance according to the limitation, the eſtate muſt determine: a demand however had better be made, for the reaſon before ſtated.

If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform it is not obliged to ſeek the party to whom it is payable elſewhere; nor is he to whom it is to be performed obliged to accept of the performance elſewhere: but he may accept it at another place, and it will be good. Bac. Abr. tit. Conditions (O. 4.)

Rent reſerved payable yearly is to be paid on the land; becauſe the land is the debtor, and that is the place of demand appointed by law. So, if a man leaſes, rendering rent, and the leſſee binds himſelf in a ſum to perform the covenants; this does not alter the place of payment of the rent, for it may be tendered on the land without ſeeking the obligee: except where the condition is for the performance of homage or other corporeal ſervice to the perſon of the lord. *Ibid.* Co Lit. 201. *b.*

The leſſee of the king muſt pay his rent, without demand, at the Exchequer, wherever it may be; but if the king grant the land in reverſion, the rent muſt be demanded on the land, before the patentee can enter as for a forfeiture on non-payment. Cro. Eliz. 462.*

As to the landlord's right of re-entry being waived, if a leſſor receive rent-arrear by any act affirming the leſſee's poſſeſſion, it bars his right of re-entry for non-payment on the day it was due. *Ibid.* 3.

Thus, in an action of ejectment, the caſe was, a prebend let land for years rendering rent, and a re-entry for non-payment. The rent was demanded and was not paid, and two days afterwards the leſſor received the rent of him and made him an acquittance by the name of his fermor. Whether this receipt barred him or not of his re-entry? was the *Ibid.*

queſtion. It was clearly reſolved that the bare receipt of the rent after the day was no bar, for it was a duty due to him: but a diſtreſs for the rent, or the receipt of rent due at another day, was a bar, for thoſe acts affirm the leſſee to have lawful poſſeſſion: ſo, if he makes him an acquittance with a recital that he is his tenant. In the principal caſe, the leſſor calling him his fermor, was a full declaration of his meaning to continue him his tenant, and it was adjudged that the entry was not lawful.

3 Salk. 3. So, where a leaſe was made to one for life, rendering rent at *Michaelmas*, with a clauſe of re-entry for non-payment, the rent was in arrear, and afterwards the leſſor brought an action for the rent: adjudged, that notwithſtanding this action, he (the leſſor) might ſtill enter for a breach of the condition; for the action for the rent did not affirm the leaſe, becauſe it ſhall be intended to be brought as for a duty due upon a contract: but if he had diſtrained for the rent not being paid at the day, then he can never afterwards enter for a breach of the condition, becauſe the diſtreſs affirms the continuance of the leaſe.

Ibid. So, a gift was made to the huſband and wife, and to the heirs of the bodies; they afterwards made a leaſe of the lands, reſerving rent on ſuch a day, with a clauſe of re-entry; then the huſband died, and the rent being in arrear, the iſſue in tail accepted it: adjudged, that this was no affirmance of the leaſe as to himſelf, becauſe the rent was not due to him whilſt his mother was living; but it had been otherwiſe, if he had accepted it after her death.

2 T. R. 431. It is indeed a rule, that the mere acceptance of rent ſhall not operate as a waiver of a forfeiture, or as a confirmation of the tenancy, unleſs the landlord had notice that a forfeiture was incurred at the time, or did ſome other act indicating his intention to continue the leſſee in his term: and ſuch acceptance is matter of evidence only, as to the *quo animo*, to be left to the jury under the circumſtances of the caſe.

Cowp. 243.

Touching conditions of re-entry for non-payment of rent or the breach of any other covenant, the law upon that ſubject is ſo well digeſted in Mr. Serjeant *Williams's* excellent edition

edition of the firſt volume of *Saunders's Reports*, that his note containing it may well be here introduced.

Where a condition of re-entry is reſerved for non-payment of rent, ſeveral things are required by the common law to be previouſly done by the reverſioner, to entitle him to re-enter. 1. A demand muſt be made of the rent. 2. The demand muſt be of the preciſe rent due; for if a penny more or leſs be demanded, it will be ill. 3. It muſt be made preciſely upon the day on which the rent is due and payable by the leaſe to ſave the forfeiture: as where the proviſo is, "that if the rent ſhall be behind and unpaid by the "ſpace of thirty or any other number of days, after the days "of payment, it ſhall be lawful for the leſſor to re-enter," a demand muſt be made on the thirtieth or other laſt day. 4. It muſt be made a convenient time before ſun-ſet. 5. It muſt be made upon the land, and at the moſt notorious place of it. Therefore, if there be a dwelling-houſe upon the land, the demand muſt be at the front or fore-door; though it is not neceſſary to enter the houſe, notwithſtanding the door be open. But if the tenant meet the leſſor either on or off the land at any time of the laſt day of payment, and tender the rent, it is ſufficient to ſave a forfeiture, for the law leans againſt forfeitures. 6. Unleſs a place be appointed where the rent is payable; in which caſe a demand muſt be made at ſuch place. 7. A demand of rent muſt be made in fact, and ſo averred in pleading, although there ſhould be no perſon on the land ready to pay it. 8. If after theſe requiſites have been performed by the reverſioner, the tenant neglects or refuſes to pay the rent, then the reverſioner is entitled to re-enter. However, it is to be obſerved, that no *actual* entry is neceſſary to be made by him into the land, but it is ſufficient to bring an ejectment only; though it was held otherwiſe until Lord *Hale's* time, when it was decided that the entry confeſſed by the defendant in the ejectment, was ſufficient without any actual entry; which deciſion has been adhered to ever ſince.—It follows, as a neceſſary inference from what has been premiſed, that a demand made after or before the laſt day on which the leſſee has to pay the rent in order to prevent a forfeiture, or off the land, will not be ſufficient to defeat the eſtate. But now to obviate

t Saund. 287. a. 16.

viate theſe niceties in ſome caſes, the ſtat. 4 G. 3. c. 28. preſcribes a particular mode of proceeding in caſes of premiſſes left vacant and half a year's rent being due, but no ſufficient diſtreſs being thereon.

Ibid. The ſame requiſites which are deemed neceſſary in order to entitle the leſſor to re-enter, are alſo neceſſary in order to entitle him to recover a *nomine poenæ*, as it is called, which is not conſidered ſo much as a remedy for the recovery of the rent, as a penalty to oblige the tenant to a punctual payment of it; and being ſo immediately connected with the ſubject of this chapter, we have thought proper to notice it in this part of the work. A *nomine poenæ* being ſo conſidered, where a proviſo is, that if the rent be in arrear for the ſpace of thirty days next after the days of payment, the leſſee ſhall forfeit ten ſhillings a day by way of penalty, in that caſe, in order to entitle the leſſor to recover the penalty, there muſt be a demand of the rent in like manner in every reſpect, as we have before ſeen, is required in caſes of re-entry for non-payment of rent.—A diſtinction is taken between a power to re-enter, or a *nomine poenæ*, and a power to diſtrain: as where a rent is granted payable, *&c.* and in default of payment if it be demanded, the grantee may diſtrain: in this caſe, it is held not to be neceſſary to make a demand on the day as in the caſe of a re-entry, or a *nomine poenæ*, but he may demand the rent at any time after.

Ibid. In caſes of conditions of re-entry there is a difference between leaſes for *lives* and leaſes for *years*; and with reſpect to the latter, there is alſo a difference between *them*, which ariſes entirely from the manner in which the condition of re-entry is expreſſed in the leaſe.

Ibid. As to leaſes for lives, it is held that if the tenant neglect or refuſe to pay his rent after a regular demand, or is guilty of any other breach of the condition of re-entry, the leaſe is only voidable, and therefore not determined until the leſſor re-enters, that is, brings an ejectment for the forfeiture; and this, though the clauſe of the condition ſhould be, that for non-payment of the rent, or the like, the leaſe ſhall ceaſe and be void: for it is a rule, that where an eſtate commences by livery, it cannot be determined before entry

try; therefore if the leſſor, after notice of the forfeiture, which is a material and iſſuable fact, accept rent which accrued due after, or does any other act which amounts to a diſpenſation of the forfeiture; the leaſe which was before voidable, is thereby affirmed.

But if there be a leaſe for years, with a condition, that for non-payment of the rent or the like, the leaſe ſhall be null and void, in ſuch caſe if the leſſor makes a legal demand of the rent and the leſſee neglects or refuſes to pay, or if the leſſee is guilty of any other breach of the condition of re-entry, the leaſe is abſolutely determined, and cannot be ſet up again by acceptance of rent due after the breach of the condition, or by any other act. Yet if in ſuch leaſe the clauſe be, that for non-payment of the rent it ſhould be lawful for the leſſor to re-enter, the leaſe is only voidable, and may be affirmed by acceptance of rent accrued after, or other act, if the leſſor had notice of the breach of the condition at the time. *Ibid.*

Generally as to covenants, as to the operation of an act of Parliament in reſpect to them; where the queſtion is, whether a covenant be repealed by an act of Parliament, this is the difference; *viz.* where one covenants not to do an act or thing which it was lawful to do, and an act of Parliament comes afterwards and compels him to do it, the ſtatute repeals the covenant; ſo, if one covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed: but if a man covenants not to do a thing which at the time was unlawful, and an act comes and makes it lawful to do it, ſuch act of Parliament does not repeal the covenant. 1 Salk 198.

It has however been held that if a man covenant to do a thing, and it is afterwards prohibited, yet the covenant is binding; for that a penal ſtatute cannot have a retroſpective operation. 3 Mod. 39.

Where a conveyance of land is void, ſo as no eſtate paſſes, all dependent covenants are void alſo; otherwiſe of covenants independent. 1 Salk. 199.

There is a difference between covenants in general and covenants ſecured by a penalty or forfeiture. In the latter caſe, the obligee has his election; he may either bring an 4 Bur. 2228. Dougl. 93.

action

action of debt for the penalty, after the recovery of which he cannot reſort to the covenant, becauſe the penalty is to go in ſatisfaction for the whole: or if he does not chooſe to go for the penalty, he may proceed upon the covenant, and recover more or leſs than the penalty, *toties quoties*.

Ibid. Upon this diſtinction they proceed in courts of equity; they will relieve againſt a penalty, upon a compenſation; but where the covenant is "to pay a particular liquidated "ſum," a court of equity cannot make a new covenant for a man, nor is there any room for compenſation or relief.

Ibid. As, in leaſes containing a covenant againſt ploughing up meadow; if the covenant be "not to plough," and there be a penalty, a court of equity will relieve againſt the penalty; and will even go further than that to preſerve the ſubſtance of the agreement. But if it is worded "to pay 5*l.* an acre for "every acre ploughed up," there is no alternative, no room for any relief againſt it, no compenſation; it is the ſubſtance of the agreement; it is the particular liquidated ſum fixed and agreed upon between the parties, and is therefore the proper *quantum* of the damages.

4 Bur. 2229. It is therefore clear, that where the preciſe ſum is not the eſſence of the agreement, the *quantum* of the damages may be aſſeſſed by the jury: but where the preciſe ſum is fixed and agreed upon between the parties, that very ſum is the aſcertained damage and the jury are confined to it.

3 T. R. 393. If tenant for a term of years leaſe for a leſs term and aſſign his reverſion, and the aſſignee take a conveyance of the fee, by which his former reverſionary intereſt is merged, the covenants incident to that reverſionary intereſt are thereby extinguiſhed.

CHAPTER

CHAPTER XI.

Of Aſſignments and Under-Leaſes;

And in what caſes Aſſignees are bound by Covenants, or may take advantage of them, whether the Aſſignment or Under-Leaſe be abſolute; or by way of Mortgage.

AN aſſignment is the transferring and ſetting over to another ſome right, title, or intereſt in things, in which a third perſon, not a party to the aſſignment, has a concern and intereſt. Bac. Abr. tit. Aſſignment.

Every one therefore who has an eſtate or intereſt in lands and tenements, may aſſign it: as tenant for life, for years, *&c.* [But a tenant at will, or ſufferance, cannot aſſign, it is conceived, for reaſons before mentioned.] Com. Dig tit. Aſſignment (A.) *ante* p.

So the intereſt or eſtate that a man hath by extent, is aſſignable from man to man at pleaſure. Shep. Touch. 242.

Therefore, if the wife has a judgment, and it is extended upon an *elegit*, the huſband may aſſign it without a conſideration; ſo, if a judgment be given in truſt for a feme ſole who marries, and by conſent of her truſtees is in poſſeſſion of the land extended, the huſband may aſſign over the extended intereſt; and by the ſame reaſon if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and ſhe is in poſſeſſion of the land under this decree and marries, the huſband may aſſign it without any conſideration, for it is in the nature of an extent. 3 P. Wms. 200.

So, every one who has a preſent and certain eſtate or intereſt in things which lie in grant, may aſſign; as in a rent, common, advowſon, *&c.* Com. Dig. *ut ante.*

Though the intereſt be future: as a term for years to commence *in futuro* may be aſſigned; for the intereſt is veſted *in præſenti*, though it does not effect till a future time. *Ibid.*

So a poſſibility of a term is aſſignable in equity for a good conſideration, though not ſo at law: and though a contingent 9 Mod. 102. 2 P. Wms. 608.

contingent intereſt, which a huſband has in right of his wife, or the poſſibility of a term, is not ſtrictly good by way of aſſignment, yet either will operate as an agreement where for a valuable conſideration; but it muſt be an aſſignment of that particular thing, and not reſt only in intention and conſtruction of words in a covenant.

Cro. Eliz. 275. So, a leſſee for years of the crown may aſſign his term, though he is ouſted by a ſtranger; for the reverſion being in the crown, he cannot be out of poſſeſſion but at his pleaſure: but ordinarily a leſſee cannot aſſign his term if an actual ouſter had taken place, till he re-enter.

Ibid. 15.

Com. Dig. *ut ante.* So, if the conuzee of a ſtatute extend the land of the conuzor, who is afterwards evicted by a conuzee of a prior ſtatute, yet he may aſſign his intereſt; for he ſhall have it again after the prior ſtatute is ſatisfied.

2 Mod. 317. A power, where it is coupled with an intereſt, may be aſſigned, though a bare power is not aſſignable; therefore, if a leaſe be made with an exception of the trees, and a power be reſerved to the leſſor to enter and cut them down, he may aſſign this power to another perſon; but if it be not properly purſued, the leſſee may maintain treſpaſs both againſt the leſſor and his aſſignee.

Godb. 188. A leaſe was made for years of lands excepting the woods; the leſſor grants the trees to the leſſee, and he aſſigns the land over to another; the trees do not paſs by this aſſignment to the aſſignee.

But generally a choſe in action, bare right, or poſſibility cannot be aſſigned; and where it is otherwiſe it ariſes from the enactment of ſome ſtatute, or the conſtruction of a court of equity.

4 Mod. 48. As a right is not aſſignable, if the conuzee of a ſtatute ſue an extent, and a *liberate* is returned, yet if he ſuffer the conuzor to keep poſſeſſion, he cannot aſſign the lands; for his poſſeſſion under the *liberate* is by his own entry turned to a right.

Cro. Jac. 180. But the king, by virtue of his prerogative, may aſſign a choſe in action, and the aſſignee may ſue either in his own name or in the king's.

Ibid. Yet if the king grant a choſe in action to another, as he may, his grantee cannot aſſign it to another.

An

An aſſignment, as contradiſtinguiſhed from an under-leaſe, ſignifies a parting with the whole term; and when the whole term is made over by the leſſee, although in the deed by which that is done, the rent, and a power of re-entry for non-payment, are reſerved to him, and not to the original leſſor, yet this is an aſſignment and not an under-leaſe; and in ſuch caſe, the original leſſor or his aſſignee of the reverſion, may ſue or be ſued on the reſpective covenants in the original leaſe, even though new covenants are introduced in the aſſignment. Doug. 187. n. † 59. *Vide* 1 Str. 405. and *ante*, p. 143.

So, if a leſſee for three years aſſign his term for four years, or demiſes the premiſſes for four years, he does not thereby gain any portions reverſion, but it amounts to an aſſignment of his intereſt. 1 Ld. Raym. 99.

An aſſignment is uſually made by the words "grant, aſ-"ſign, and ſet over;" but no particular expreſſions are neceſſary for the purpoſe, provided the intention of the parties is ſufficiently explained.

No conſideration need be expreſſed in an aſſignment, for the aſſignees being ſubject to the payment of the rent reſerved by the leaſe is held to be a ſufficient conſideration. Noy. Max. 92. 1 Mod. 263. 2 Mod. 252.

An aſſignment muſt, by the ſtatute of Frauds, be in writing; the ſtatute enacts, that "no leaſes, eſtates, or inte-"reſts, either of freehold or terms of years, or any uncer-"tain intereſt, (not being copyhold or cuſtomary intereſt,) "of, in, to, or out of any meſſuages, manors, lands, tene-"ments, or hereditaments, ſhall be aſſigned, granted, or "ſurrendered, unleſs it be by deed or note in writing, "ſigned by the party ſo aſſigning, granting, or ſurrender-"ing the ſame, or their agents thereunto lawfully autho-"riſed by writing, or by act and operation of law." 29 Car. 2. c. 3.

It was once held that an aſſignment need not be ſtamped; but this is now made neceſſary by ſtatute 23 *G.* 3. *c.* 58.

The party aſſigning is called the aſſignor, and he to whom the aſſignment is made, the aſſignee.

The proper covenants on the part of the aſſignor are, that the indenture of leaſe is good in law; that he has power to aſſign; to ſave the aſſignee harmleſs from former grants and incumbrances; for the delivery of deeds and muniments; and for quiet enjoyment.

The

The proper covenants on the part of the aſſignee are that he will pay the rent, or perform the ſervices, as the caſe may be; and that he will perform the covenants contained in the indenture of leaſe, or ſave harmleſs the aſſignor therefrom.

Com. Dig. tit. Aſſignment (B.) Co. Lit. 384. *b.* Aſſignees are in fact, or in law.—Under the word "aſſigns," the aſſignee of an aſſignee *in perpetuum*, the heir of an aſſignee, or aſſignee of an heir, ſhall take. So, if a man covenant with another "his executors and aſſigns," the aſſignee of an aſſignee, and his executors, and the aſſignee of an executor or adminiſtrator of every aſſignee, are included, and ſhall have covenant.

1 Ld. Raym. 99. 2 Salk. 10. *s. c.* It ſeems that an action will not lie by an aſſignor againſt an aſſignee, for he has no reſiduary intereſt.

Doug. 460. In leaſes, the leſſee being a party to the original contract continues always liable, notwithſtanding any aſſignment.

Cro. Jac. 309. Cro. Car 579. 4 Mod. 81. 3 Salk. 48. Cro. Jac. 334. Therefore, covenant will lie againſt a leſſee for years on an expreſs covenant, as to repair, pay rent, *&c.* notwithſtanding he has aſſigned his term and the leſſor has accepted rent from the aſſignee.—But an action of debt will not lie after acceptance of rent.

4 Mod. 88. Cro. Jac. 522. 3 Salk. 5. So, the executor of a leſſee is liable to the grantee of the reverſion on ſuch covenants; though the leſſee may have aſſigned his term and the grantee have accepted rent of the aſſignee.

Cro. Car. 188. For no aſſignment nor acceptance of the rent by the hands of the aſſignee ſhall take from him the advantage of ſuing him or his executors upon an expreſs covenant; no more than if a leſſee had obliged himſelf in an obligation to pay his rent, his aſſignment over of his term, and the acceptance of the rent by the leſſor of the aſſignee, ſhall not take from him the advantage of the obligation.

1 Ld. Raym. 553. For the perſonal repreſentative of a leſſee for years is his aſſignee, and a covenant to repair runs with the land, as it is to be performed on it, and therefore binds the aſſignee.

Cro. Car. 503. So, with reſpect of a covenant to make further aſſurance.

Eſp. N. P. 290. So, if there is a covenant which runs with the land, and the leſſee aſſigns over, and the aſſignee dies inteſtate, the leſſor may have covenant againſt the adminiſtrator of the aſſignee and declare againſt him as aſſignee: for ſuch covenants

nants bind thoſe who come in by act of law, as well as by act of the parties.

Though all the eſtate of the leſſee is aſſigned by act of Parliament, if there are no words of diſcharge the leſſee's executor is ſtill liable to covenant for the rent. Bac. Abr. tit. Covenant (E. 4. *n.*)

Where there is a bond for the performance of the covenants in a leaſe, if the leſſee aſſigns the leaſe, he may likewiſe aſſign the bond: but this muſt be before any of the covenants are broken; for if any of the covenants are broken, and the leſſee afterwards aſſigns the leaſe and bond, and the aſſignee puts the bond in ſuit for thoſe breaches, it is maintenance. Godb. 81.

An aſſignee muſt take the thing aſſigned, ſubject to all the equity to which the original party was ſubject. Doug. 636.

The aſſignee of a term is bound, therefore, to perform all the covenants which are annexed to the eſtate; for when a covenant relates to and is to operate on a thing in being, parcel of the demiſe, the thing to be done by force of the covenant is, as it were, annexed to the thing demiſed, and ſhall go with the land, and bind the aſſignee in the performance, though not named: for the aſſignee, by the acceptance of the poſſeſſion of the land, makes himſelf ſubject to all the covenants that run with the land, of which repairing is one, building another, to pay rent a third, *&c.* and to ſuch he is bound without being named by the ſpecial word "aſſigns." Bull. N. P. 159. Eſp. N. P. 289. 3 Salk. 4.

So, where there was a covenant to uſe the land in a huſbandman-like manner, and leave it in like condition, it was held to be ſuch a covenant as ran with the land, and that the executor of the landlord might ſue on it. Eſp. N. P. 295.

The aſſignee, however, is liable only in reſpect of his poſſeſſion of the thing; he bears the burthen while he enjoys the benefit, and no longer; and if the whole is not paſſed, if a day only is reſerved, he is not liable: [for he then is conſidered, not as an aſſignee, but an under-tenant.] Doug. 184. 460.

But under an abſolute aſſignment of a term the aſſignee may be ſued on the covenants before he has taken actual poſſeſſion: for by the aſſignment the title and poſſeſſory right might paſs and the aſſignee become poſſeſſed in law; and as to the actual poſſeſſion, that muſt depend on the nature Doug 462. *n.* [1.]

of the property whether it can take place; thus the premiſſes might be waſte or unprofitable ground, or ground intended to build upon.

As to the extent to which the leſſee or aſſignee is liable in covenant, there is a conſiderable difference.

Ibid. 458. 764. 1. The leſſor has, from his covenant, both a privity of contract and of eſtate; and though he aſſigns, and thereby deſtroys the privity of eſtate, yet the privity of contract continues, and he is liable in covenant notwithſtanding the aſſignment.

Bac. Abr. tit. Covenant (E. 4.) 2. But the aſſignee comes in only in privity of eſtate, and therefore is liable only while in poſſeſſion: except, indeed, in the caſe of rent, for which, though he aſſign over, he is notwithſtanding liable as to the arrears incurred before, as well as during his enjoyment; and ſuch aſſignee was made liable in equity, though the privity of eſtate was deſtroyed at common law.

Cro. Jac. 533. If a leſſee covenants that he and his aſſigns will repair the houſe demiſed, and the leſſor grants over the term, and the aſſignee does not repair it, an action of covenant lies either againſt the aſſignee at common law, becauſe this covenant runs with the land; or it lies againſt the leſſee, at the election of the leſſor, who may charge both; but execution ſhall be againſt one of them only, for if he take both in execution, he that is laſt taken ſhall have an *audita querela*.

Ibid. 125. So, covenant lies againſt an aſſignee on a covenant not to plough, although aſſigns are not named in the deed; for it is for the benefit of the eſtate, and runs with the land.

Bac. Abr. tit. Covenant (E. 3.) So, if *A.* leaſes lands to *B.* and *B.* covenants to pay the rent, repair houſes, *&c.* during the ſaid term, and afterwards aſſigns to *C.* the aſſignee is bound to perform the covenants during the term of the firſt leſſee, though the aſſignee be not named; becauſe the covenant runs with the land made for the maintenance of a thing *in eſſe* at the time of the leaſe made.

Cro. Car. 422. A covenant may be dividable and follow the land: wherefore an action of covenant will lie againſt an aſſignee of part of the thing demiſed.

Ibid. Therefore, where one demiſed two houſes, with covenant on

on the part of the leſſee for himſelf and aſſigns to repair, the leſſee aſſigned one of them, and for not repairing the leſſor brought covenant againſt the aſſignee, which action was held well to lie.

The aſſignee of part of an eſtate is not liable for rent for the whole. Doug. 186.

But if a leſſee grant or aſſign part of his eſtate, yet the entire privity of contract is not at an end, and the leſſee would it ſeems remain liable on his covenant to pay the entire rent, for he cannot apportion it. *Ibid.* Cro. Eliz. 633. 637.

Leſſee of tithes covenants for him and his "aſſigns," that he will not let any of the farmers in the pariſh have any part of the tithes; this covenant runs with the tithes, and binds the aſſignee. 3 Wilſ. 25.

Where a covenant is for the benefit of the eſtate demiſed, it will extend to the aſſignee, though not named.

Therefore, a covenant that a leſſee ſhould reſide on the demiſed premiſſes during the term, was held to extend to his aſſignee, though not named in the covenant. 2 H. Bl. R. 133.

The aſſignee may aſſign, and thereby get rid of his ſubſequent rent, and of the covenants which run with the land: and as he may do ſo at law, ſo *a fortiori* may he do ſo in equity; for though the tenant's liability on his covenant to pay rent ſubſiſts during the continuance of the leaſe, notwithſtanding he may become a bankrupt and be deprived of all his property, there is no perſonal confidence in the aſſignee of the leſſee, and when he parts with the leaſe, he alſo gets rid of his liability. 2 Atk. 546. 12 Mod. 23. 2 Str. 1221. 4 T. R. 99. 8 T. R. 61.

But an aſſignee, who aſſigns over, is liable to covenant for the rent incurred during his enjoyment; and if covenant be brought, he may plead that before any rent was due he granted all his term to *J. S.* who by virtue thereof entered and was poſſeſſed; and this will be a good diſcharge without alledging notice of the aſſignment, and the aſſignment will be good though made a day before the rent due to a priſoner in the Fleet; nor can the plaintiff take advantage of it by replying *per fraudem*, unleſs he can prove a truſt: it was the leſſor's own fault and folly to take the firſt aſſignee for his tenant, nor is he without remedy, for he Bull. N. P. 159. 4 Mod. 72. Doug. 764. 12 Mod 23.

may bring covenant againſt the leſſee, or may diſtrain upon the land.

Doug. 444. As by the aſſignment the title and poſſeſſory right paſs and the aſſignee becomes poſſeſſed in law, and therefore is only liable while in actual poſſeſſion, ſo, if he aſſign over before a breach, though *his* aſſignee have not taken actual poſſeſſion, yet he (the firſt aſſignee) is not liable to an action of covenant.

1 Ld. Raym. 367. 3 Salk. 48. It is not neceſſary that notice ſhould be given to the reverſioner of an aſſignment over. In an action againſt the aſſignee of a term, the plea of an aſſignment over ought to ſhew that ſuch aſſignment over was made after the aſſignment ſtated in the declaration: but if it does not, no objection can be made againſt it after replication that ſuch aſſignment over was fraudulent.

1 Show. 338. 1 Salk. 196. Where there is an exception in a leaſe of an entry, and liberty to waſh in the kitchen, and a paſſage for that purpoſe, an action will lie againſt an aſſignee for hindering the leſſor; for a covenant relating to a way or other profit *apprendre* goes with the tenement and binds the aſſignee.

Bac. Abr. tit. Covenant (E. 3.) Stile, 407. If a man leaſes for years, and the leſſee covenants for him and his aſſigns to pay the rent, ſo long as he and they ſhall have the poſſeſſion of the thing let, and the leſſee aſſigns; the term expires, and the aſſignee continues the poſſeſſion afterwards: an action of covenant will lie againſt him for rent behind after the expiration of the term; for though he is not an aſſignee ſtrictly according to the rules of law, yet he ſhall be accounted ſuch an aſſignee as is to perform the covenants.

4 T. R. 98. Noy. Max. 91. Touching the difference of debt and covenant againſt an aſſignee, it is extremely clear that a perſon who enters into an expreſs covenant in a leaſe, continues liable on his covenant, notwithſtanding the leaſe be aſſigned over. The diſtinction between the actions of debt and covenant, which was taken in early times, is equally clear: if the leſſee aſſign over the leaſe, and the leſſor accept the aſſignee as his leſſee, either tacitly or expreſsly, it appears by the authorities that an action of debt will not lie againſt the original leſſee; but all thoſe caſes with one voice declare, that if there

there be an *expreſs covenant*, the obligation on ſuch covenant ſtill continues: and this is founded not on precedents only, but on reaſon; for when a landlord grants his leaſe, he ſelects his tenant; he truſts to the ſkill and reſponſibility of that tenant; and it cannot be endured that he ſhould afterwards be deprived of his action on the covenant to which he truſted, by an act to which he cannot object (as the aſſignment of a bankrupt's intereſt) as in the caſe of an execution. In ſuch a caſe, the leſſor has no choice of the under-tenant; ſo, in the principal caſe, the aſſignees were bound to ſell the term, and perhaps they might aſſign to a perſon in whom the leſſor had no confidence; wherefore the leſſee was held liable, notwithſtanding his bankruptcy.

Covenants in law, therefore, or implied covenants, do not charge the aſſignee.

Nor is an aſſignee liable on a covenant that relates to ſomething not in being at the time of the demiſe, or merely perſonal or collateral to the thing demiſed; as to pay a ſum of money in groſs, to build *de novo*, or the like, for it does not run with the land, and therefore aſſignees are not bound even though they be expreſsly named.

Thus, if a man leaſes ſheep or any thing perſonal, and the leſſee covenants for himſelf and "his aſſigns" at the end of the term to deliver up the ſheep or things ſo let, or ſuch a price for them; if the leſſee aſſign, this covenant ſhall not bind the aſſignee; for it is but a perſonal contract, and wants ſuch privity as is between the leſſor and the leſſee and his aſſigns, by reaſon of the reverſion. 5 Co. 17. 3 Rep.

Tithes, however, are ſo far aſſimilated to land, being the profits thereof, as to form an exception. 3 Wils. 25.

As the aſſignee of a term is not liable on a mere collateral covenant, therefore where the leſſee of certain premiſſes covenanted to pay annually, during the term of twenty-one years, twenty ſhillings to the churchwardens of the pariſh, his aſſignee was held to be not liable. Cro. Jac. 438.

But though generally a perſonal or collateral covenant affects not an aſſignee, yet if the covenant regard ſomething to be done upon the land, and the aſſignee be named, though it were not in being at the time of the demiſe, and be in ſome meaſure collateral, as to build a wall, or new 5 Co. 16. *b* Bull. N. P. 159.

houſe upon the land, *&c.* it ſhall bind the aſſignee; becauſe he will receive the benefit of it.

Yet, though the aſſignee be named in the original covenant, if it has been broken before aſſignment, no action will lie againſt him; for he ſhall not be anſwerable for a breach which he never committed.

1 Bl. R. 351. 3 Bur. 1272. *s.c.* Thus, where the leſſee covenanted to pull down certain old houſes, and rebuild others within ſeven years, but did not perform the covenant, and at the end of ſeven years aſſigned; an action was brought againſt the aſſignee and held not to lie; the breach being complete before the aſſignment: had the covenant, however, been broken before the aſſignment, as if the leſſee had aſſigned before the time expired, the aſſignee would have been liable.

Salk. 199. 1 Ld. Raym 388.

Vide ante, p. 259. 1 Frem. 336. Noy. Max. 91. 1 Show. 340. Doug 452. Co. Lit. 3. *a.* 356. *b.* Neither is an aſſignee liable for the breach of any covenant, as for rent due, after he has aſſigned over his term; becauſe the privity of eſtate is gone: and this though the aſſignment over be made without notice to the leſſor: and though ſuch aſſignment goes to the *feme covert*; for ſhe may purchaſe.

Doug. 764. The aſſignee therefore of a term, declared againſt as ſuch, is not liable for rent accruing after he has aſſigned over, though it be ſtated that the leſſor was a party executing the aſſignment, and agreed thereby that the term, which was determinable at his option, ſhould be abſolute.

Com. Dig. tit. Covenant (B.) Yet where a breach is continuing it ſhall be otherwiſe; as if a covenant be to repair within ſuch time after notice, if the leſſee does not repair upon notice by the aſſignee, covenant lies; though it was out of repair before the aſſignment.

Hard. 88. A rent ſhall not be decreed againſt the aſſignee of a wine-licence leaſe, who purchaſed without notice of the rent; for the rent does not run with the licence, but is due upon the contract only.

3 Wils. 33. A covenant not to aſſign generally, muſt be perſonal and collateral, and can only bind the leſſee himſelf; for there never can be any aſſignee.

Bac Abr. tit. Covenant (E. 5.) As an aſſignee ſhall be bound by a covenant real annexed to the eſtate, and which runs along with it, ſo ſhall he take advantage of ſuch.

Therefore,

Therefore, if the leſſor covenants to repair, or if he grants to the leſſee ſo many eſtovers as will repair, or that he ſhall burn within his houſe during the term; theſe, as things appurtenant, ſhall go with it into whoſe hand ſoever it comes. *Ibid.*

So, if a man leaſes land to another by indenture, the covenant in law created by the word "demiſe," ſhall go to the aſſignee of the term, and he ſhall have advantage of it. *Ibid.*

But though generally an aſſignee of a term who comes in by act of law, as well as by deed as by ſtatute-merchant, ſhall have the benefit of covenants; an aſſignee of a leaſe by eſtoppel is an exception to the rule; for there is a difference where a covenant is annexed to a thing which of its nature cannot paſs at the firſt without deed, and where not; for in the firſt caſe, the aſſignee ought to be in by deed, otherwiſe he ſhall not have advantage of the covenant. Cro. Eliz. 373 437.

If one by indenture leaſe an houſe for forty years, and the leſſee covenants with the leſſor that he will ſufficiently repair the houſe during the term, and that the leſſor may enter every year, to ſee if the repairs are done; and if upon view of the leſſor it was repaired according to the agreement, that then the leſſee ſhould hold the houſe for forty years after the firſt term ended, and the leſſee grants to another all the intereſt in the term and terms which he had in the tenements, and after the firſt term ended, the aſſignee ſhall not take the benefit of this agreement.

But if *A.* leaſes a houſe to *B.* for years who covenants to repair, and that *A.* his heirs, executors, and adminiſtrators, may at all times enter, and ſee in what plight the ſame is; and if upon ſuch view any default ſhall be found in the not repairing, and thereof warning ſhall be given to *B.* his executors, *&c.* then within four months after ſuch warning ſuch default ſhall be amended, and afterwards, the houſe in default of *B.* becomes ruinous, and *A.* grants the reverſion to *C.* who upon view of the houſe gives warning to *B.* of the default, *&c.* if it be not repaired *C.* may have an action as aſſignee of *A.* againſt *B.* though the houſe became ruinous before *C.* was entitled to the reverſion; for the action is not founded upon the ruinous eſtate of the houſe, and the Bac. Abr. *ut ante.*

time when it firſt happened, but for not repairing within the time appointed by the covenant after the warning.

Cro. Eliz. 863. But an aſſignee ſhall not have an action upon a breach of covenant before his own time.

The aſſignee of a term may take advantage of a covenant againſt the aſſignee of the reverſion; and he may have this remedy by way of retainer againſt ſuch aſſignee.

Ibid. Therefore where *A.* leaſed lands to *B.* for two hundred years, and by the ſame deed covenanted for himſelf, his heirs, and aſſigns, with *B.* his executors, and aſſigns, that if *B.* were diſturbed for reſpite of homage, or enforced to pay any charge or iſſues loſt, he ſhould withhold ſo much of his rent as he ſhould be enforced to pay, and *A.* grants his reverſion to *C.* and *B.* aſſigns the term to *D.* *D.* may take the benefit of this covenant againſt *C.* for it runs with the land.

2 Vern. 423. An aſſignee ſhall not be prevented of a benefit allowed by law for the avoidance of a rent.

At common law, no grantee or aſſignee of a reverſion could take the benefit or advantage of a condition for re-entry. It was, therefore, enacted by ſtat. 32 *H.* 8. *c.* 34. that all perſons grantees of the reverſion of any lands from the king, or grantees or aſſignees of any common perſon, their heirs, executors, ſucceſſors, and aſſigns, ſhall have like advantage againſt the leſſees, *&c.* by entry for non-payment of rent, or for doing waſte or other forfeiture, and the ſame remedy by action only for not performing other conditions, covenants, and agreements contained in the ſaid leaſes, as the leſſors or grantors themſelves had.

On this ſtatute it is to be obſerved,

Eſp. N. P. 293. Co. Lit. 215. *a.* Cro. Eliz. 863. 1. That as the words of the ſtatute are againſt leſſees, it does not extend to covenants upon eſtates in fee or in tail, but only upon leaſes made for life or years.

Co. Lit. 215. *a.* 2. That an aſſignee of part of the eſtate of the reverſion may take advantage of the condition; as if leſſee for life be, *&c.* and the reverſion is granted for life; ſo if leſſee for years, *&c.* be, and the reverſion is granted for years, the grantee for years ſhall take advantage of the condition in reſpect of the word "executors" in the act.

3. But

3. But a grantee of part of the reverſion ſhall not take advantage of the condition; as, if the leaſe be of three acres, reſerving a rent upon condition, and the reverſion is granted of two acres, the rent ſhall be apportioned by the act of the parties, but the condition is deſtroyed, for that it is entire and againſt common right, except indeed in the caſe of the king. *Ibid.*

4. Whoever comes in by the act of the party, as by bargain and ſale of the reverſion, or by grant of the reverſion in fee to the uſe of *A.* is an aſſignee within the ſtatute, as the bargainee in the one caſe, and *A.* in the other. *Ibid.*

But ſuch as come in merely by act of law, as the lord by eſcheat, or are in of another eſtate, ſhall not take benefit of the ſtatute. *Ibid.*

5. The grantee ſhall not take advantage of a condition before he has given notice to the leſſee, but he may of a covenant. Cro. Jac. 476.

6. The grantee or aſſignee ſhall take advantage of ſuch conditions only as are incident to and for the benefit of the reverſion; as rent, waſte, repairs, making fences, ſcouring ditches, preſerving woods, or ſuch like; and not for the payment of any ſum in groſs, the delivery of corn, wood, or the like. So, "other forfeiture" relates to ſuch things as are incident to the reverſion and run with the land. Co. Lit. 215. *b.*

7. The aſſignee of the leſſor may maintain covenant againſt the leſſee after the leſſee had aſſigned, and he had accepted rent from the aſſignee, for ſuch is within the ſtatute. 2 Show. 134.

So, an aſſignee of a reverſion, who hath accepted rent from the aſſignee of the term, may maintain covenant againſt the executor of the leſſee, or the aſſignee of the term, for a breach of covenant running with the land, though it be committed after the aſſignment of the reverſion. Cro. Jac. 522.

But otherwiſe it is of a covenant in land, which is only created by the law, or of a rent, which is created by reaſon of the contract, and is, by reaſon of the profits of the land, wherein none is longer chargeable with them than the privity of eſtate continue with them. *Ibid.* 523.

8. The ſurrenderee of a copyhold reverſion may bring debt or covenant againſt the leſſee within the equity of this ſtatute, for it is a remedial law, and no prejudice can ariſe to the lord. 1 Salk. 185.

With

Aſſignment by way of Mortgage. Doug. 462. *n.* [1]

With reſpect to aſſignments by way of mortgage, being merely conditional, they are not conſidered as an actual tranſfer of property, but as a ſecurity only for money.

2 Vern. 275.

So, if a leſſee for years, with covenants to repair, aſſigns to *J. S.* by way of mortgage, and *J. S.* never enters, equity will not compel him to repair, though he had the whole intereſt in him; and though it was his own folly to take an aſſignment of the whole term, when he ſhould have taken a derivative leaſe, by which means he would not be liable at law.

Ibid. 378.

But a caſe occurs, where ſuch an aſſignee, though he never entered, and had loſt his mortgage money, was by law compelled to pay the rent, and having ſued in equity could have no relief.

Doug. 455.

Even at law however now, if a term is aſſigned by way of mortgage, (inſtead of an under-leaſe being made) with a clauſe of redemption, the leſſor cannot ſue the mortgagee as aſſignee of all the eſtate, right, title, intereſt, &c. of the mortgagor, even after the mortgage has been forfeited, unleſs the mortgagee has taken actual poſſeſſion.

3 T. R. 393.

If mortgagor and mortgagee make a leaſe in which the covenants for the rent and repairs are only with the mortgagor and his aſſigns, the aſſignee of the mortgagee cannot maintain an action for the breach of theſe covenants, becauſe they are collateral to his grantor's intereſt in the land, and therefore do not run with it.

Ibid. 698.

But if the tenant for a term convey the term by way of mortgage, and then join with the mortgagee in a leaſe for a ſhorter term, in which the covenants for the rent and repairs are only with the mortgagor and his aſſigns, and the intereſts of the mortgagor and mortgagee become extinguiſhed during the leaſe by the reverſioner acquiring their eſtates, ſtill the mortgagor may maintain an action of covenant againſt the leſſee, the covenants being in groſs.

Doug. 188. *n.*

That which cannot be ſupported as an aſſignment ſhall be good as an under-leaſe againſt the party granting it.

Ibid. 56.
3 Wilſ. 234.
2 Bl. R. 767.
Ibid. 57. 184.

Under a proviſo that all aſſignments of a leaſe ſhall be void, if not enrolled, under-leaſes are not included.

An under-leaſe is not an aſſignment to the effect of working a forfeiture under a proviſo not to aſſign.

It

It has therefore become uſual to inſert a proviſo in leaſes, that the leſſee *&c.* ſhall not let, ſet, transfer, or aſſign over the whole or *any part* of the premiſſes. 2 T. R. 425.

An under-leaſe, made by a leſſee for years, determinable on a future day certain, and to commence immediately on his death, is good, he dying within the time. Cro. Jac. 459.

It was formerly held that an action on the caſe would lie by a leſſee for years againſt his under-tenants for ſo negligently keeping his fire that the premiſſes were burned down; though not againſt a tenant at will. 4 Mod. 9. 12 Mod. 15.

But by ſtat. 14 *G.* 3. *c.* 28. *s.* 86. it is enacted, that no action, ſuit, or proceſs whatever, ſhall be had, maintained, or proſecuted, againſt any perſon in whoſe houſe, chamber, ſtable, barn, or other building, or on whoſe eſtate any fire ſhall accidentally begin, nor ſhall any recompence be made by ſuch perſon for any damage ſuffered thereby, any law, uſage, or cuſtom, to the contrary notwithſtanding.

The landlord or original leſſor cannot ſue an under-tenant on a covenant for rent contained in the original leaſe. Doug. 183.

An under-leaſe of the whole term amounts to an aſſignment. 1 Ld. Raym. 99.

But if the leſſor reſerves the rent to himſelf on granting over, it is an under-leaſe and not an aſſignment, though he parts with the whole term. 1 Str. 404.

A man poſſeſſed of a term for twenty years, may grant the lands for nineteen years, to commence after his death, and it will be good for ſo many of the twenty years as ſhall be unexpired at the time of his death. *Ibid.* 737.

An action will lie by the aſſignee of a reverſion for years againſt an under-leſſee on a covenant to leave the premiſſes in repair. Cro. Eliz. 596.

CHAPTER

CHAPTER XII.

Of changes happening by Marriage, Bankruptcy, Inſolvency, or Death: wherein of Deviſees, Executors, and Adminiſtrators, and in what caſes they are bound by, and may take advantage of Covenants.

Changes by Marriage. Bac. Ab. tit. Baronet Feme, (C. 2)

THE marriage is a gift in law to the huſband of all the wife's chattels real, as a term for years in right of his wife; ſo of eſtates by ſtatute-merchant, ſtatute-ſtaple, elegit, *&c.* and of theſe he may alone diſpoſe, or forfeit, or they may be extended for his debts.

Ibid. But if he makes no diſpoſition of them in his life time, they ſurvive to the wife, and therefore he cannot deviſe them.

Ibid. For the huſband is only poſſeſſed of a term in her right; and the term or legal intereſt continues in her.

Ibid. If a woman, leſſee for years, takes huſband, who afterwards purchaſes a new leaſe to them both for their lives of the ſame lands, this is a ſurrender in law of the firſt term, and ſhall bind the wife; becauſe it amounts to an actual diſpoſition thereof, which the huſband had power to make.

2 Mod. 43. Huſband poſſeſſed of a long term in right of his wife, made an under-leaſe for ten years, and on borrowing money of the leſſee covenanted to grant him another leaſe after the end of the ten years, to continue during the time he had any right, but died before any ſuch leaſe was made: it was decreed that this was a good diſpoſition of the term in equity.

2 Vern. 7. So, if a man marries a woman who has a term of years ſettled on her in truſt, the huſband may as well diſpoſe of this truſt as if the legal intereſt was in her.

Ibid. It is agreed however without doubt that where a term is aſſigned in truſt for a feme with the privity and conſent

conſent of her huſband, the huſband cannot intermeddle with or diſpoſe of it.

Even where the huſband was poſſeſſed of a term in right of his wife from whom he was divorced *à menſâ & thoro*, he being about to ſell the term, an injunction was granted; for though the marriage continues notwithſtanding the divorce, yet the huſband does nothing as huſband, nor the wife as wife. 9 Mod. 44.

It is now ſettled however that a man poſſeſſed of a term of years in right of his wife as executrix of her former huſband has power to grant and convey the ſame: for the huſband may adminiſter in right of his wife without her conſent, though ſhe cannot adminiſter without the conſent of the huſband; and if the huſband can adminiſter, *jure uxoris*, without her conſent, it is incident to the power of adminiſtration to ſell or diſpoſe of a term of years. 3 Wilſ. 277. 2 Bl. R. 801. *ſ. c.*

If the huſband poſſeſſed of a term for ſeventy years in right of his wife, makes a leaſe of thoſe lands for twenty years, to begin after his death, this is good and ſhall bind the wife; becauſe the term, being but a chattel, he had power to diſpoſe of it wholly, and by conſequence may diſpoſe of any leſſer intereſt thereout as he thinks fit, and this being a preſent diſpoſition, which he cannot revoke, binds the intereſt of the lands immediately, though it takes not effect in poſſeſſion till after his death: this differs therefore from a deviſe of ſuch term, or any part thereof by the huſband, by his will; for that not taking effect, nor binding the intereſt at all till after his death, comes too late to prevent the operation of law, which at the inſtant of death, immediately caſts it upon the wife ſurviving, and ſo defeats and deſtroys the operation of the deviſe. Bac. Ab. tit. Baron and Feme (C. 2.)

But as to the reſidue of the term, whereof the huſband makes no diſpoſition in his life-time, the wife, if ſhe ſurvives, will be entitled to it; becauſe as to that, the law is left to take place, as it would have done for the whole, if he had not prevented it by ſuch his diſpoſition of part. *Ibid.*

Yet if the huſband had granted away the whole term upon condition and died, though the condition were afterwards broken and his executors entered for breach thereof, the wife would notwithſtanding be for ever barred to claim *Ibid.*

any intereſt in the ſaid term; becauſe there was a total diſpoſition thereof by the huſband in his life-time, and the breach or non-performance of the condition was perfectly contingent and uncertain: beſides that, the breach of the condition happened not till after his death, and ſo the diſpoſition continued perfect and uninterrupted during his life; for if the condition had been broken during his life, and he himſelf had entered for breach thereof, it might be a great queſtion if the wife ſurviving ſhould not have the term after his death, becauſe by his re-entry for the condition broken, he is reſtored to the whole term *in ſtatu quo*, and then being poſſeſſed of it in right of his wife as he was before, it ſeems but reaſonable that the wife ſhould have it, if ſhe ſurvived the huſband, as ſhe would have had if no ſuch diſpoſition had been made, ſince that diſpoſition is now defeated and gone.

Bac. Abr. ut ante. Alſo, ſuch term, whereof the huſband is poſſeſſed in right of his wife, may be extended for the debts, or forfeited for the crimes of the huſband; for theſe are legal diſpoſitions thereof, which ſhall bind the wife.

But if the huſband ſhould grant a rent, common, *&c.* out of ſuch term and die, this would not bind the wife ſurviving, becauſe the term or poſſeſſion itſelf being left to come entire to the wife, all intermediate charges or grants thereout by the huſband determine with his death; for the title of the wife to ſuch term has relation to the time of their intermarriage, and ſo is paramount to all collateral charges or grants made thereout by the huſband after.

Ibid. So, a grant by the huſband of the herbage or veſture of ſuch land which he held in right of his wife for years, will be void after his death; becauſe they are part of the land itſelf, and not collateral to it.

If the huſband and wife be evicted of a term which he hath in right of his wife, and the huſband brings an ejectment in his own name, and hath judgment to recover, this makes an alteration in the term and veſts it in the huſband; becauſe, not making his wife a party to the recovery, he takes the whole wrong to be done to himſelf, and conſequently if he recovers, it muſt be by virtue of that right whereof he was diſſeiſed.

Huſband

Huſband and wife make a leaſe for years by indenture of the wife's lands reſerving rent; the leſſee enters; the huſband before any day of payment dies, the wife takes a ſecond huſband, and he at the day accepts the rent and dies: it was holden, that the wife could not now avoid the leaſe, for by her ſecond marriage ſhe transferred her power of avoiding it to her huſband, and his acceptance of the rent binds her, as her own before ſuch marriage would have done; for he, by the marriage, ſucceeded into the power and place of his wife, and what ſhe might have done, either as to affirming or avoiding ſuch leaſe before marriage, the ſame may the huſband do after the marriage. Bac. Abr. tit. Baron and Feme (I.)

As the wife's acceptance of rent or fealty, *&c.* will make good and unavoidable leaſes for years, made by her and her huſband at common law, or by her huſband ſolely, if they be by indenture or deed-poll; ſo, if the wife die before her huſband, the ſame election and power of affirming or avoiding ſuch leaſes deſcends to her iſſue or heir: for ſuch leaſes are good, till thoſe who ſucceed to the eſtate defeat and avoid them by their diſagreement thereto.

Therefore, where a woman tenant in-tail, having iſſue by a former huſband, after his death married a ſecond huſband, and they by indenture joined in a leaſe for years of the wife's lands, rendering rent, and then the wife died without iſſue by the ſecond huſband, ſo that he was not entitled to be tenant by the curteſy, it was holden, that till the iſſue by the firſt huſband entered, this leaſe remained good, and therefore the huſband there recovered in an action of covenant againſt the leſſee, upon iſſue found for him, that there was no entry made by the wife's iſſue; becauſe till then the leaſe was ſtill ſubſiſting, and conſequently the leſſee bound by his covenants in ſuch leaſe.

So, where a man ſeiſed of land in right of his wife, makes a leaſe for years, rendering rent, and then his wife dies without iſſue by him, whereby he is not tenant by the curteſy, but his eſtates determined; yet he may avow for the rent till the heir hath made his actual entry, becauſe the leaſe was at firſt good, and drawn out of the ſeiſin of the wife; and therefore, till the entry of the heir, remains good between the leſſor and the leſſee, ſo that the leſſee may maintain

maintain an action of covenant, and the leſſor diſtrain and avow for the rent, till the heir hath entered.

b Salk. 4. The huſband and wife made a leaſe of the lands of the wife, then the huſband died, and the wife married again, and this ſecond huſband accepted the rent: adjudged; that by ſuch acceptance he hath affirmed the leaſe, even *quoad* the wife herſelf; becauſe ſhe had reſigned her election to her ſecond huſband, and he by his acceptance of the rent had affirmed the leaſe.

Ibid. If a term of years be granted to a feme covert and another, or if a feme ſole and another are joint-tenants of a term of years and the feme takes huſband, yet in both caſes the joint-tenancy ſtill continues, for the marriage makes no ſeverance or alteration of it, but gives the huſband the ſame power his wife had before, by an actual diſpoſition of her moiety to break the joint-tenancy, and bind his wife's intereſt therein; but without ſuch diſpoſition; the joint-tenancy continues, and if the huſband dies, the whole ſhall go accordingly.

Ibid. So, if ſuch joint-tenants are ouſted of the term, the wife ſhall join with the huſband and the other joint-tenant in ejectment, and the wife ſhall have judgment to recover as well as the huſband; and if in ſuch caſe before any actual diſpoſition made by the huſband, his wife die, the whole term ſhall go to the ſurviving joint-tenant and no part thereof to the huſband: becauſe, though the huſband, if he ſurvives, is by law to have all chattels real and perſonal of his wife's and this term was a chattel real, yet the title of the other joint-tenant to have the whole by ſurvivorſhip, coming at the ſame inſtant and being the elder title, ſhall prevail againſt the huſband.

Bac. Abr. tit. Baron and Feme (E.) Although by the marriage, the huſband and wife become one perſon in law, and therefore ſuch an union works an extinguiſhment or revocation of ſeveral acts done by her before the marriage, yet in things which would be manifeſtly to the prejudice of both huſband and wife, the law does not make her acts void.

Ibid. Therefore, if a feme ſole makes a leaſe at will, or is leſſee at will, and afterwards marries, the marriage is no determination of her will, ſo as to make the leaſe void; nor

can

can ſhe herſelf without the conſent of her huſband determine the leaſe in either caſe.

The huſband, as head or governor of the family, has an abſolute power over the chattels real and perſonal of which he is poſſeſſed in right of his wife, to diſpoſe of them as he thinks proper, and no act or concurrence of hers is of any avail, either in confirming or controuling ſuch diſpoſition. Bac. Abr. tit. *ut ante.* (I.)

Therefore, if an expreſs condition (as to pay rent) be annexed to the eſtate of a woman, who takes huſband, the laches of the huſband to perform the condition, loſes the eſtate for ever. Co. Lit. 246. *b.*

But the laches of the huſband to perform a condition in law, which does not require ſkill or confidence, (as not to alien in fee) does not prejudice his wife. *Ibid.* 233. *b.*

The real eſtate however of the feme is under a different regulation from that by which her chattels real and perſonal are governed, for it is under the power of the huſband no longer than during the coverture, and therefore any diſpoſition of it made by him alone may be defeated; alſo, all charges laid on it by him, fall off with his death. Bac. Abr. *ut ante.*

But the huſband during coverture may take the rents and profits of the whole eſtate of his wife: and as he has the ſole diſpoſition of all intereſts of his wife, he may, for an intereſt which veſts in the wife, or accrues to her during coverture, either ſue alone, or with his wife. Com. Dig. tit. Baron and Feme (O.)

If a feme ſole hath right to have common for life, and ſhe takes huſband, and he is hindered in taking the common, he may have an action alone without his wife, it being only to recover damages. Bac. Abr. tit. *ut ante.* (K.)

But if baron and feme are diſſeiſed of the land of the feme, they muſt join in an action for the recovery of the land. *Ibid.*

If *A.* demiſe a houſe to *B.* for years, and *B.* covenants to repair the ſaid houſe during the term, and afterwards *A.* grants the reverſion to baron and feme, *&c.* the baron may have an action alone upon this covenant. *Ibid in n.*

But if lands be conveyed with a covenant for further aſſurance to huſband and wife, ſhe muſt be joined with him in an action for the breach of ſuch covenant. Cro. Car. 505.

Bac. Abr. *ut ante.*

In thoſe caſes where the debt or cauſe of action will ſurvive to the wife, the huſband and wife are regularly to join in the action; as in recovering debts due to the wife before marriage, in actions relating to her freehold or inheritance, or injuries done to her perſon.

Com. Dig. tit. Baron and Feme (X.)

In other caſes, as in actions for a profit accrued during the coverture to the huſband in right of his wife, in which the huſband may ſue alone or join with his wife, it is the more ſure mode to join.

Ibid. (O.)

If there be a leaſe by the wife *dum ſola*, payment of the rent ought to be to the huſband; and payment to the wife without the huſband's order, though there be no notice of the marriage, ſhall not diſcharge the leſſee. [For other matter relative to this ſubject ſee *ante* p. 82, *&c.*]

Of Changes by Bankruptcy.

The legal right that the landlord has to diſtrain the goods of his tenant for rent in arrear, is not affected by the tenant's bankruptcy while the goods remain on the premiſſes.

2 Atk. 105.

For a landlord is conſidered in a higher degree than a common creditor, and it would be hard to preclude him from diſtraining, where there are goods on the premiſſes.

Ibid. 104.

The iſſuing a commiſſion of bankrupt therefore againſt a tenant, and the meſſenger's poſſeſſion of his goods, does not hinder the landlord from diſtraining for rent; for this is not ſuch a *cuſtodia legis* as an execution is, and there too the law allows the landlord a year's rent: in fact, the aſſignment of the commiſſioners of the bankrupt's eſtate and effects, is only changing the property of the goods; therefore while upon the premiſſes they are ſtill liable.

Ibid. 103.

The landlord may diſtrain the goods for his entire debt, even after aſſignment or ſale by the aſſignees, if the goods are not removed: the reaſon is, becauſe no proviſion is made in the caſe of bankruptcy by the ſtatute (8 *Ann.* c. 14.) which gives the landlord a year's rent on executions.

Cooke's B. L. 223.

But it is a principle that a landlord has no lien in ſuch caſe after the goods are removed from the premiſſes.

1 Bro. 427. 1 Atk. 102, 103.

Therefore if the landlord neglects to diſtrain, and ſuffers the goods to be ſold by the aſſignees and removed from off the premiſſes, he can only come in on an average with the reſt of the creditors.

Alſo,

Alſo, if landlord prove his debt for rent under the commiſſion and ſwear that he has no ſecurity, he thereby waives, it ſhould ſeem, his right to diſtrain; and the vendee of ſuch goods under the aſſignee will be entitled to the goods. *Ibid.* 104.

So, a landlord who petitions to be paid the rent in arrear at the time of the commiſſion being taken out, ſeven years after the effects had been ſold by the aſſignees, was conſidered only as a common creditor, and compelled to come in *pro rata*, his demand being a ſtale one. *Ibid.* 103.

A mortgagee who has paid the arrears of rent on a bankrupt's eſtate, unleſs he has an order of the Court of Chancery to ſtand in the landlord's place, ſhall not be preferred to the creditors under the commiſſion. *Ibid.*

Where on goods being ſold under a diſtreſs for rent, a balance remained in the hands of the conſtable, the tenant or his repreſentative could only come in for his proportion with the other creditors: if any thing had remained in ſpecie it might have been different, but in this caſe the money was embezzled. Cooke's B. L. 226.

So, the commiſſioners may ſell all lands and tenements which the bankrupt had at the time of his bankruptcy in fee-tail, for life, or years, rents, annuities, reverſions and remainders, and alſo any future or contingent intereſt in land.—So, they may ſell terms of years. *Ibid.* 349. *Ibid.* 213.

If there be two joint-tenants, and the one becomes bankrupt and dies, the bankrupt's part it ſhould ſeem ſhall be ſold, and there ſhall be no ſurvivorſhip. *Ibid.* 350.

If the bankrupt be ſeiſed in right of his wife, the commiſſioners may ſell during coverture. *Ibid.*

So, the aſſignees are entitled to the benefit of an equity of redemption. 2 Vern. 96.

But they are not entitled to the benefit of a covenant for the renewal of a leaſe. *Ibid.*

By the ſtat. 21 *J.* 1. *c.* 19. *s.* 14. lands, goods, *&c.* whereof an extent or execution is ſerved and executed before a trader became bankrupt, cannot be aſſigned; nor can lands be aſſigned if a ſtatute be extended upon them, though the liberate was not ſued before the bankruptcy.

The commiſſioners cannot aſſign a leaſe wherein a condition 2 T. R. 133.

dition is contained, making the leaſe void on the tenant committing an act of bankruptcy whereon a commiſſion ſhall iſſue: for ſuch a proviſo is legal, and the landlord may re-enter by virtue thereof.

Cooke's B. L. 370. Ambler, 480. It has been determined, however, that the commiſſioners may aſſign a leaſe granted to the bankrupt, in which there is a proviſo that the leſſee, his executors, or adminiſtrators ſhall not aſſign without the leſſor's conſent in writing.

Doug. 184. An aſſignee of a bankrupt, a deviſee, and a perſonal repreſentative, and one who purchaſes a term from the ſheriff under an execution, are aſſignees in law to the purpoſe of being liable to actions on a covenant for rent in a leaſe to the bankrupt's deviſor or inteſtate.

1 Eſp. R. 233. Peake's Ca. 238. 2 H. Bl. 319. But the aſſignees of a bankrupt are not liable for the rent of premiſſes aſſigned to them by the commiſſioners, unleſs they take poſſeſſion.

1 Eſp. R. 283. Neither are the aſſignees liable to an action of covenant for rent, arrear accrued ſubſequent to the bankruptcy, of premiſſes which had been the bankrupt's.

Cooke's B. L. 351. Copyholds, though not affected by an extent or other execution, are within the operation of the ſtatutes reſpecting bankrupts, being indeed expreſsly named in the 13th *Eliz.* and may therefore be aſſigned by the commiſſioners.

Ibid. 352. The lord is to be compounded with for the admiſſion, by the expreſs proviſion of the ſtatute: but if the commiſſioners ſell a copyhold, and the vendee tenders to the lord a competent fine, (which on a ſurrender is generally one year's full value, (2 *Bur.* 32.) which he refuſes and will not admit the vendee, he may enter.

Ibid. The bargain and ſale by the commiſſioners binds the copyholder and bars his eſtate, and he is no copyholder after the bargain and ſale is enrolled.

Ibid. If the copyhold be conveyed to the general aſſignees they will be conſidered as vendees and muſt pay the fine.

Ibid. 353. Therefore to avoid a double fine, they are uſually conveyed to the purchaſer in the firſt inſtance.

Changes by Inſolvency. Eſp. N. P. 244. Reſpecting the change made in the ſituation of landlord or tenant by the inſolvency of either of them, it is to be obſerved that the Inſolvent Acts are occaſional, and uſually enact, That any perſon whoſe debts do not amount to

100*l.*

100*l.* (or 200*l.* or 300*l.* as the particular Act prescribes) may on giving notice fourteen days before to his creditors, and delivering up upon oath all his effects (bedding, apparel, and implements of trade only excepted) be discharged on petition to the court from whence the process issued, or to the sessions.

All interests in lands, therefore, and chattels real, must be inserted in the schedule which is to contain an enumeration of the insolvent debtor's estate and effects, upon executing an assignment and conveyance of which, for the benefit of the creditors at whose suit he is in execution, he shall be discharged; unless the creditor insist on his detention and agree to allow him weekly a sum not exceeding 3*s.* 6*d.*

But where there is a bond with a penalty, and also a deed of covenant, and the tenant takes the benefit of an Insolvent Act, whereby the bond is discharged, he is still liable on any future breach of his covenant; unless specially saved by the statute. Doug. 93.

Changes by Death.

The alteration that is effected by the death of the landlord or tenant has reference to a devisee, or an executor or administrator; for as to the heir, he is out of question, as such, with respect to a chattel interest.

As no man is *prima facie* ever to be looked upon to die intestate, devisees are first entitled to our consideration.

By the statutes 32 and 34 *H.* 8. *c.* 1. *s.* 5. a man may devise all his lands, tenements, and hereditaments, reversions and remainders.

So, if a man has a rent for him and his heirs for the life of *B.* he may devise it. Cro. Eliz. 702.

So, an interest, though it be in contingency, may be devised. Com. Dig. tit. Devise (L. M. 3 T. R. 88.

Therefore, if one devise a reversion after an estate for life, or in tail, and that comes to his possession, the land passes: and a general residuary clause in a will carries a reversion. M.S.Kent Sum. Ass. 1800. 3 Mod. 229.

Of Devisees.

A devisee is an assignee in law, and as such is liable to an action on a covenant in a lease to pay rent, or on any other covenant that runs with the land. Doug. 184.

As he is liable to covenants that regard the reversion, so it is presumed is he capable of maintaining an action for the breach Com. Dig. tit. Covenant (B. 3.)

breach of ſuch covenants: for by the common law, upon a covenant in law, the aſſignee of the eſtate ſhall have an action.

A deviſee, therefore, is in the predicament of an ordinary aſſignee, by whom an action lies upon every covenant that concerns the land; as to pay rent, not to do waſte, *&c.*

Executors and Adminiſtrators. Shep. Touch. 468.

With reſpect to executors and adminiſtrators, the executor or adminiſtrator ſhall have by virtue of his executorſhip or adminiſtration, all the chattels real and perſonal of the teſtator; as well thoſe that are in poſſeſſion, as leaſes for years of land, rent, common, or the like, corn growing or cut, trees, and graſs cut and ſevered, as alſo thoſe that are in action, as right and intereſt of execution upon judgments, ſtatutes, *&c.*

Ibid. So, the executor or adminiſtrator of the lord ſhall have the fines aſſeſſed upon the tenants upon their admittances in the lord's time.

Ibid. So, if I make a leaſe for life rendering rent, and the rent is behind, and then I die; in this caſe the arrearages of rent due to me in my life-time ſhall go to my executor or adminiſtrator in the nature of a chattel.

Ibid. So, if a rent be granted out of land to me in fee-ſimple, fee-tail, for life, or years, and it be not paid to me in my life time, theſe arrearages ſhall go to my executor or adminiſtrator, and not to any other.

Ibid. 469. So, alſo, if a parſon have an annuity in fee in right of his church, and it be behind and the parſon die; in this caſe, the executor or adminiſtrator, not the ſucceſſor of the parſon, ſhall have the arrearages.

Ibid. If I be ſeiſed of land and poſſeſſed of a flock of cattle, and let it to another for years, and he covenant by the leaſe to pay me and my wife, our heirs, and aſſigns 100 *l. per ann.* during the term; in this caſe, after my death, and my wife ſurviving me, her executor or adminiſtrator, and not my heir, ſhall have this payment.

Ibid. So, if one make me a leaſe of land firſt for years, and then grant me the trees for a number of years, to begin after the end of the term of the land; I have the trees in the nature of a chattel, and if I die my executor or adminiſtrator ſhall have them.

So,

So, if a leaſe for years of land be granted to me and my heirs, or to me and my ſucceſſors, and I die; my executor or adminiſtrator, and not my heir, ſhall have the term. *Ibid.*

The ſame law is, if a covenant or an obligation be made to me and my heirs: for in theſe caſes, this is ſtill a chattel in me that ſhall go to my executor or adminiſtrator, and he only ſhall take advantage of it: and if my heir or ſucceſſor happen to get the deed, the executor or adminiſtrator may recover it from him. *Ibid.*

If a leaſe be made to me for twenty years, without naming my executors or adminiſtrators or aſſigns; in this caſe, if I die, my executor or adminiſtrator notwithſtanding ſhall have it during the term. *Ibid.* 470.

So, if a leaſe for years be made to a biſhop and his ſucceſſors, and he die, his executor or adminiſtrator, not his ſucceſſor, ſhall have it. *Ibid.*

If the leſſee for life make a leaſe for years abſolutely, this in law is a leaſe for ſo many years if the life ſo long live, and ſhall go to the executor or adminiſtrator after his death. *Ibid.*

In the caſe of a tenancy from year to year as long as both parties pleaſe, if the tenant die inteſtate, his adminiſtrator has the ſame intereſt in the land which his inteſtate had: for whatever chattel the inteſtate had muſt veſt in his adminiſtrator or his legal repreſentative. 3 T. R. 16.

The charters and evidences that concern any of my chattels which my executor or adminiſtrator is to have, ſhall go with the ſame chattels.—So alſo any charters whatſoever, if they be pledged to me for money, ſhall go to my executor or adminiſtrator until the money be paid. Shep. Touch. 469.

If I have a box, cheſt, or trunk, wherein my writings that concern my inheritance lie, and the ſame is open and not ſealed or locked; in this caſe, (it is ſaid) my executor ſhall have it: but if it be locked or ſealed, *contra*; for then it ſhall go to him that is to have the writings [*qu?* eſtate] as incident thereunto. *Ibi.*

But this diſtinction ſeems to be erroneous, for thoſe deeds and evidences, that belong to the heir as incident to the inheritance, ſhall not go to executor or adminiſtrator; and whether the cheſt containing them happen to be open or ſhut at the party's deceaſe, as it cannot alter their reference *Ibid.*

to the inheritance, ſo it ſhould not tranſfer the right of the heir to the executor or adminiſtrator, who have no concern with the freehold.

Ibi. So, the executor or adminiſtrator ſhall not have the graſs and trees growing on the ground, no more than the ſoil or ground itſelf whereon they grow.

Ibid. Neither is an executor or adminiſtrator entitled to pales, walls, ſtalks, fiſh in ponds, deer, or conies in parks, pigeons in pigeon-houſes, or the like.

Ibid. 471. If a leaſe be made for life or years, of land, whereon a houſe is ſtanding, or timber is growing, and the houſe is proſtrate or the timber is cut or fallen down (by whomſoever, or by what means ſoever it be;) the materials of this houſe, and this timber, is now become a chattel: and therefore, if the leaſe be without impeachment of waſte, it ſhall go to the leſſee, and after his death to his executor or adminiſtrator; but if the leaſe be otherwiſe, it ſhall go to the leſſor, and after his death to his executor or adminiſtrator. —But, if the timber be cut for reparations only, or the leſſee will employ the materials of the houſe to build it again, and the leaſe continue, it may be ſo employed, and then the executor or adminiſtrator of the leſſor may not take it.

Ibid. 481. An executor or adminiſtrator regularly ſhall charge others for any debt or duty due to the deceaſed, as the deceaſed himſelf might have done; and the ſame actions which the deceaſed might have had, the ſame actions for the moſt part the executor or adminiſtrator may have alſo.

Ibid. Therefore he may have an action of account, upon the caſe, or *aſſumpſit*, for uſe and occupation of his teſtator's or the inteſtate's premiſſes.

Shep. Touch. 481. So, an action of ejectment will lie by the executor or adminiſtrator for an ejectment of the teſtator out of a term.

Ibid. An action of debt alſo, for rent behind in the life time of the deceaſed may be brought by his executor or adminiſtrator: for if any rent or arrearages of rent be due to me upon a grant of rent out of my land to me, or reſervation of rent upon any eſtate made by me of land; in theſe caſes, my executor or adminiſtrator may have an action of debt for this rent, or he may diſtrain for it, ſo long as the land that is chargeable with the rent and out of which it iſſues, is in his poſſeſſion,

Ibid. 482.

poſſeſſion that ought to pay it, or in the poſſeſſion of any one that claims by or under him.

As an executor or adminiſtrator ſhall regularly charge others for any debt or duty due to the deceaſed, ſo ſhall he be charged by others for any debt or duty due from the deceaſed, as the deceaſed himſelf might have been charged in his life-time, ſo far forth as he hath any of the eſtate of the deceaſed to diſcharge the ſame. *Ibid.*

Therefore, if a leaſe for years be made rendering rent, and the rent is behind, and the leſſee die; in this caſe the executor or adminiſtrator of the leſſee ſhall be charged for this rent. *Ibid.* 483.

So, alſo, if a leſſee for years aſſign over his intereſt and die, his executor or adminiſtrator ſhall be charged with the arrearages before the aſſignment, but not with any of the arrearages due after the aſſignment. *Ibid.*

But an executor or adminiſtrator ſhall not charge another, or have any action againſt him for a perſonal wrong done to the teſtator, when the wrong done to his perſon or that which is his, is of that nature as for which damages only are to be recovered; therefore, an executor or adminiſtrator cannot ſue another for a treſpaſs done to him in his cattle, graſs, or corn, [unleſs it be ſtanding corn, which is a chattel, *contra* of corn growing, which belongs to the freehold, 3 *Salk.* 160.] or for waſte done by his tenant in his lands; for theſe are ſaid to be perſonal actions which die with the perſon, according to the rule, *actio perſonalis moritur cum perſonâ.* *Ibid.*

So, an executor or adminiſtrator ſhall not be charged for any perſonal wrong done by the deceaſed, and therefore no action may be brought againſt him for any ſuch cauſe; as for cutting down trees, or for ſuffering his cattle, to eat up the plaintiff's graſs.—An action for uſe and occupation by the deceaſed, however, may perhaps be maintained againſt his executor or adminiſtrator. *Ibid.* 484.

Touching the caſes in which executors or adminiſtrators are affected by the covenants made by or in favour of their teſtators and inteſtates:

An action for the breach of a covenant made to the deceaſed lies for an executor or adminiſtrator; ſo, for a covenant broken in the life-time of the teſtator, the executor, Shep. Touch. 481. 2 Lev. 26. Vent. 175.

and

and not the heir or aſſignee, ſhall have the action of cove-

Eſp. N. P. 295. nant, although (it is ſaid) it were a covenant real, which runs with the land; and the damages ſhall be recovered by the executor, though not named, as he perſonally repreſents the teſtator.

2 Lev. 92. Skinn. 305. *ſ. c.* 1 Salk. 141. Yet where the leſſee covenanted to repair, and to leave the premiſſes in repair, it was held (in a caſe long prior to that laſt quoted from *Eſp. N. P.*) that the heir ſhould have an action of covenant on this, though not named; for it was a covenant which run with the eſtate, and ſo ſhould go with the reverſion to the heir.

The diſtinction taken is perhaps by reaſon of the one injury not favouring of waſte, and the other favouring of waſte; for remedies for waſte regard the reverſion, and therefore lie with the heir; or it may be that the remedy for breach of covenant to repair is given to the heir, becauſe his perſonal comfort and convenience are abridged by ſuch a breach, which cannot occur to one deceaſed; whereas a covenant to uſe land in a huſbandman-like manner, and to leave it in ſuch condition, regards rather the temporal intereſt than the perſonal comfort of the covenantee.

Fitz. Nat. Brev. 145. (D.) Bro. tit. Covenant 12. Shep. Touch. 482. Executors ſhall alſo have a writ of covenant of a covenant made to their anceſtors for a perſonal thing. Yet according to *The Touchſtone*, where the covenant is but perſonal, as where one makes a leaſe for years, and the leſſor covenants to pay the quit rents, but he does not ſay during the term, by this it ſeems the executor or adminiſtrator of the leſſor ſhall not be charged.

Plowd. Com. 286. If the leſſor covenants with the leſſee to make him a new leaſe at the end of his term, and the leſſee dies, his executor may have covenant on this, though not named.

Hob. 188. Executors or adminiſtrators who come to any term of lands or tenements, as ſuch, are bound by the covenants which run with the eſtate, as belonging to the perſonal property of the teſtator or inteſtate.

1 Wiſ. 4. Where lands come to an executor or adminiſtrator, he may be charged for a breach in his own time, as for non-payment of rent, or with an action of covenant, either in that right or as aſſignee; but there is this difference;

1 Salk. 309. If declared againſt as aſſignee, he is chargeable as ter-

tenant

tenant, or one who hath the actual poſſeſſion of the land, and the judgment is *de bonis propriis.*

But if the action be brought againſt him as executor or adminiſtrator, the judgment ſhall be *de bonis teſtatoris*, even where the breach has been committed in his own time, as for repairs, *&c.* for it is the teſtator's covenant which binds the executor, as repreſenting him, and he therefore muſt be ſued by that name. *Ibid.* Hob. 188. Cro. Jac. 671.

Covenant lies by the leſſor againſt the adminiſtrator of the aſſignee of the leſſee, againſt whom he may declare as aſſignee, for breach of a covenant that runs with the land. Bull. N. P. 159. Eſp. N. P. 190.

If a covenant by two leſſees be joint and ſeveral, it ſhall bind the executors of the deceaſed leſſee, even though he died before the term commenced, and the whole term, intereſt and benefit ſurvive to the other leſſee. 2 Bur. 1197.

If a man covenants for himſelf only to pay money, build a houſe, for quiet enjoying, or the like, and he doth not ſay in the covenant "his executors and adminiſtrators," yet hereby his executors and adminiſtrators are bound and ſhall be charged. Shep. Touch. 178.

Yet if a leſſee for years covenant for himſelf to repair the houſes demiſed, omiting other words, it ſeems in this caſe he is bound to repair only during his life, and the executors and adminiſtrators are not bound. *Ibid.*

But upon a covenant implied, an action of covenant will not lie againſt an executor. *Ibid.*

CHAPTER

CHAPTER XIII.

Of the Remedies for and againſt Landlord and Tenant.

Firſt. Of remedies for Landlord for recovery of Rent.

SECTION I. *By Diſtreſs; wherein of Pound-Breach and Reſcue.*

SECTION II. *Action of Debt; where the Leaſe is by Deed.*

SECTION III. *Covenant; where the Leaſe is by Deed.*

SECTION IV. *Debt, or Aſſumpſit; for Uſe and Occupation.*

SECTION I. *Landlord's Remedy for Rent by Diſtreſs.*

OF the various remedies which the law affords to the landlord for the recovery of rent from his tenant, that by diſtreſs, as being the moſt antient, and one moſt ſummary in its nature, and therefore moſt commonly reſorted to, firſt claims our conſideration.—It is recommended, in preference to others, by Lord *Coke*, as the moſt plain and certain.

Co. Lit. 162. *b.*

Diſtreſs, what? 3 Bl. Com. 6.

A diſtreſs, *diſtrictio*, is the taking of a perſonal chattel out of the poſſeſſion of the wrong-doer into the cuſtody of the party injured, to procure a ſatisfaction for the wrong committed. The thing taken by this proceſs is alſo frequently called a diſtreſs.

Lies, for what? Gilb. L. of Diſ. 1. Co. Lit. *n.* 1.

It was a remedy given to the lord, to recover the rent or ſervices which the tenant had obliged himſelf by his feudal contract to pay by way of retribution for his farm; for rent is conſidered as a retribution for the land, and is therefore payable to thoſe who would otherwiſe have had the land.

Com. Dig. tit. Diſtreſs (A. 1.)

For all ſervices a diſtreſs may be made of common right; for diſtreſſes were incident by the common law to every rent

rent-ſervice, and by particular reſervation to rent-charges alſo, but not to rent-ſeck, till the ſtat. 4 *G.* 2. *c.* 28. extended the ſame remedy to all rents alike, and thereby in effect aboliſhed all material diſtinction between them.

So that now we may lay it down as an univerſal principle, that a diſtreſs may be taken for any kind of rent in arrear; the detention whereof beyond the day of payment is an injury to him that is entitled to receive it. 3 Bl. Com. 6.

Therefore, if a perſon ſeiſed in fee grants out a leſſer eſtate, ſaving the reverſion of rent, or other ſervices, the law gives him, without any expreſs proviſion, remedy for ſuch rent or ſervices by diſtreſs. *By whom Diſtreſs may be made.* Gilb. L. of Diſt. 28.

But for a rent which iſſues out of an incorporeal inheritance, the reverſioner cannot diſtrain; as if I have a right of common in another man's ſoil, and I grant it to *A.* reſerving rent, if the rent be behind, I cannot diſtrain the beaſts of *A.* becauſe that the right of common, which every man has, runs through the whole common.—The king however is an exception to this rule, for he by his prerogative can diſtrain upon all the lands of his leſſee.

So, a man cannot diſtrain for a rent iſſuing out of tithes, becauſe there is no place where the diſtreſs can be taken.

An agreement between the leſſor and the aſſignee of the original leſſee, "that the leſſor ſhould have the premiſſes "as mentioned in the leaſe, and ſhould pay a particular ſum "over and above the rent annually towards the good-will "already paid by ſuch aſſignee," operates as a ſurrender of the whole term, and the ſum reſerved for good-will being to be paid annually in groſs and not as rent, the aſſignee cannot diſtrain either for that, or for the original rent, but he has a remedy by aſſumpſit for the ſum reſerved for the good-will. 1 T. R. 441.

A perſon who has not the reverſion cannot diſtrain of common right; but he may reſerve to himſelf a power of diſtraining, or the reſervation may be good to bind the leſſee by way of contract, for the performance whereof the leſſor may have an action of debt. Gilb. L. of Diſt.

Thus if the aſſignee of a term ſurrenders to the original leſſor, though he reſerves a ſum in groſs to be paid annually, he

he cannot diſtrain for that or the original rent, but he may have an action of *aſſumpſit* for ſuch ſum in groſs.

So if a leſſee for years aſſign his term rendering rent, he cannot diſtrain for it without a particular clauſe for that purpoſe, becauſe he has no reverſionary intereſt; the only remedy that the aſſignor has, is by an action on his contract.

A deviſee may diſtrain for rent deviſed to him out of lands, if the land is charged with a diſtreſs, and not otherwiſe.

For a rent granted for equality of partition by one coparcener to another, or for a rent granted to a widow out of lands whereof ſhe is dowable in lieu of dower, or for a rent granted in lieu of lands upon an exchange, the grantee may diſtrain without any proviſion of the parties, though he has no reverſion; the law giving a diſtreſs in theſe caſes, leſt the grantee ſhould be without remedy.

But if a man grants rent over to another, after arrearages incurred, he cannot diſtrain for ſuch arrearages; becauſe they are by the grant divided from the freehold of the rent.

If a perſon enter upon certain premiſſes ſubject to the approbation of the landlord, who afterwards does not approve; but upon an agreement that the tenant will pay an advanced rent as well for the time he had been in poſſeſſion, as for the future, the landlord was willing to let him continue in poſſeſſion: in ſuch caſe, the landlord may diſtrain for the advanced rent accrued before the agreement as well as for what accrues afterwards, ſuch agreement giving him the ſame power by relation to his tenant's firſt entry into poſſeſſion, as it did to recover his rent in future.

So, a mortgagee, after giving notice of the mortgage to the tenant in poſſeſſion under a leaſe prior to the mortgage, may diſtrain for the rent in arrear at the time of the notice, (although he was not in the actual ſeiſin of the premiſſes or in the receipt of the rents and profits at the time it became due) as well as for rent which may accrue after ſuch notice; the legal title to the rent being in the mortgagee.

A receiver appointed by the Court of Chancery may diſtrain for rent, where he ſees it neceſſary, and need not apply firſt to that court for a particular order for the purpoſe;

poſe; becauſe as that court never makes an immediate order but appoints a future day for a tenant to pay, it might be an injury to the eſtate to wait till that time, as it would give the tenant an opportunity to convey his goods off the premiſſes in the mean time.—If, however, there is any doubt who has the legal right to the rent, then the receiver ſhould make an application to that court for an order; as he muſt diſtrain in the name of the perſon who has that right.

One joint-tenant may diſtrain alone; but then he muſt avow in his own right and as bailiff to the other. 5 Mod. 73. 150.

One tenant in common may diſtrain for his ſhare of the rent upon the terre-tenant holding under him and another tenant in common, where ſuch terre-tenant has paid the whole rent to the other tenant in common after notice not ſo to pay it. 5 T. R. 246.

A man may diſtrain cattle without any expreſs authority, and if he obtain the aſſent of the perſon in whoſe right he did diſtrain, his aſſent will be as effectual as his command could have been; for ſuch aſſent ſhall have relation to the time of the diſtreſs taken. Gilb. L. of Diſt. 32.

By the common law the executors or adminiſtrators of a man ſeiſed of a rent-ſervice, rent-charge, rent-ſeck, or a fee-farm, in fee-ſimple or fee-tail, could not diſtrain for the arrearages incurred in the life-time of the owner of ſuch rents.

It was, therefore, enacted by ſtat. 32 *H.* 8. *c.* 37. *ſ.* 1. That the executors and adminiſtrators of tenants in fee, fee-tail, or for term of life, for rent-ſervices, rent-charges, rent-ſeck, and fee-farms, may diſtrain upon the lands chargeable with the payment thereof, ſo long as ſuch lands remain in the poſſeſſion of the tenant who ought to have paid ſuch rent or fee-farm, or of any other perſon claiming under him by purchaſe, gift, or deſcent.

By ſection 3. of the ſame ſtatute it is enacted, That if a man hath in right of his wife any eſtate in fee-ſimple, fee-tail, or for term of life, of or in any rents or fee-farms, and the ſame rents or fee-farms ſhall be due and unpaid at the death of his wife, ſuch huſband may diſtrain for the ſaid arrearages in the ſame manner as if his wife had been living.

By ſection 4. it is enacted, That if any perſon have ſuch

rents

rents or fee-farms for term of life or lives of other perſons, he, his executors or adminiſtrators, may diſtrain for arrearages of ſuch rent incurred at the death of the *ceſtui que vie*, in the ſame manner as if ſuch *ceſtui que vie* had been ſtill living.

1 Ld. Raym. 172. This ſtatute is a remedial law, and extends to the executors of all tenants for life, as well to thoſe executors who before the ſtatute were entitled to an action of debt, as to Co. Lit. 162. *b*. thoſe who had no remedy whatever: ſo that Lord *Coke*'s idea that the preamble concerning the executors and adminiſtrators of tenant for life is to be intended of tenant *pur auter vie* ſo long as *ceſtui que vie* lives, ſeems to be too narrow.

Bull. N. P. 56. But where a tenant for life of a rent-charge confeſſed a judgment which was extended by *elegit*, and the tenant for life dying, the conuſee diſtrained, and in replevin avowed for the arrears incurred in the life-time of the tenant for life, upon demurrer the diſtreſs was holden to be bad and not warranted by the ſtatute: firſt, becauſe the caſe of the conuſee is not enumerated in it; ſecondly, becauſe he comes in in the *poſt*, and not under the tenant for life.

Ibid. 57. Neither is the executor of a grantee of a rent-charge for divers years, if he ſo long live, within the ſtatute.

Ibid. Lord *Coke* ſays, if a man make a leaſe for life, or a gift in tail reſerving rent, this is a rent-ſervice within the ſtatute; from whence it may be inferred that he thought that a rent reſerved upon a leaſe for years was not within it, and I apprehend that it is not; for the landlord is not tenant in fee, fee-tail, or for life, of ſuch a rent, and it is the executors of ſuch tenants only who are mentioned in the act. However in treſpaſs, where it appeared that the defendant had diſtrained the plaintiff's goods for rent due to his teſtator upon a leaſe for years, Lord C. J. *Lee* held it to be within the ſtatute, and the defendant obtained a verdict.

Yelv. 135. This ſtatute does not extend to copyhold rents, but only to rents out of free-land.

What things are diſtrainable. With reſpect to the things which may be taken under this proceſs, a diſtreſs being antiently conſidered merely as a pledge in the hands of the lord to compel the tenant to pay the ſervice, or perform the duty, could not at common law

Gilb. L. of Diſt. 34, &c.

be

be ſold, but was to be reſtored in the ſame plight to the owner when ſuch ſervice or duty was performed, and nothing could be diſtrained unleſs it could be returned *in ſpecie* and undamaged. It follows, that money cannot be diſtrained, unleſs it be in a bag, for then it may be identified perhaps; ſo milk, fruit, *&c.* cannot be diſtrained; nor, till made diſtrainable by ſtatute, could hay or ſheaves of corn be the ſubject of a diſtreſs, unleſs they were in a cart.

As to the things, however, which may be diſtrained or taken in diſtreſs, we may lay it down as a general rule, that all chattels perſonal are liable to be diſtrained, unleſs particularly protected or exempted. 3 Bl. Com. 7.

By ſtat. 2 *W.* 3. *c.* 5. it is enacted, That it ſhall be lawful for any, having arrear of rent, to ſeize and ſecure any ſheaves or cocks of corn, or corn looſe or in the ſtraw, or hay being in any barn or granary, or upon any hovel, ſtack, or rick, or otherwiſe upon any part of the land or ground charged with ſuch rent, and to lock up or detain the ſame in the place where the ſame ſhall be found, until the ſame ſhall be replevied, or ſold.

By ſtat. 11 *G.* 2. *c.* 19. *s.* 8. the landlord may take and ſeize, as a diſtreſs for arrears of rent, all ſorts of corn and graſs, hops, roots, fruits, pulſe, or other product whatſoever growing upon any part of the eſtate demiſed; and the ſame may cut, gather, make, cure, carry and lay up, when ripe, in the barns, or other proper place on the premiſſes; and if there ſhould be no barn or other place on the premiſſes, then in any other barn or proper place which he ſhall procure, as near as may be to the premiſſes; and in convenient time appraiſe, ſell, or otherwiſe diſpoſe of the ſame towards ſatisfaction of the rent and of the charges of ſuch diſtreſs, appraiſement, and ſale; the appraiſement thereof to be taken, when cut, gathered, cured, and made, and not before: provided always, (ſec. 9.) that notice of the place where ſuch diſtreſs ſhall be lodged, ſhall, in one week after the lodging thereof, be given to the tenant, or left at the laſt place of his abode; and that if the tenant ſhall pay or tender the arrears of rent and coſts of the diſtreſs before the corn, *&c.* be cut, the diſtreſs ſhall ceaſe and the corn, *&c.* be delivered up.

Gilb. L. of Diſt. 36, &c.

The tools and utenſils of a man's trade cannot be diſtrained while there is any other diſtreſs on the premiſſes, or even while they are in actual uſe: therefore the axe of a carpenter, the books of a ſcholar, and the like, are not diſtrainable while any other diſtreſs can be had, or while they are in actual uſe.

Thus, in trover for a ſtocking-loom which had been diſtrained for rent, where it appeared that an apprentice was uſing the loom at the time it was taken, the Court held that it could not legally be taken while the apprentice was uſing it.

But in trover for three tape-looms, where it appeared that they had been diſtrained for rent because there was no other ſufficient diſtreſs upon the premiſſes, the Court held the diſtreſs good, as it did not appear that the looms were in actual uſe at the time they were taken.

Leſt this rule, however, ſhould be carried ſo far as to privilege the ſheep of the tenant, and the beaſts of the plough, (they being the materials of huſbandry, to plough and manure the land,) and by that means the landlord be totally diſappointed of the rents, this matter has been ſettled by the ſtatute *de diſtrictione ſcaccarii*, 51 *H.* 3. *ſt.* 4. which is in affirmance of the common law, and enacts that no man ſhall be diſtrained by the beaſts of his plough or his ſheep, either by the king or any other, while there is another ſufficient diſtreſs; unleſs indeed for damage feaſant, in which caſe the thing that does the treſpaſs muſt make compenſation.

Note. In an action on the above-mentioned ſtatute, it is not neceſſary to ſhew that there was a ſufficient diſtreſs, *præter*, *&c.* but it muſt come on the other part, *viz.* to plead that there was not a ſufficient diſtreſs *præter*, *&c.* It muſt be intended that there was cattle ſufficient at the time of the diſtreſs, and it is not material what was before or after.

The rule of the common law, which exempts utenſils, tools, inſtruments of huſbandry, *&c.* from diſtreſs, has been adjudged to hold only as to diſtreſſes for rent arrear, amerciaments, *&c.* not for poor's rates, *&c.* which are out of preſent conſideration.

The

The general rule of law is, that all things upon the premiſſes are liable to the landlord's diſtreſs for rent, whether they be the effects of a tenant or of a ſtranger; becauſe of the lien which the landlord has on them in reſpect of the place where the goods are found, and not in reſpect of the perſon to whom they belong.

But this rule has many exceptions in favour of trade, to protect the goods of third perſons which happen to be upon the tenant's premiſſes in the way of his trade; therefore things ſent to public places of trade, as cloth in a taylor's ſhop, yarn in a weaver's, a horſe in a ſmith's, and the like, are not diſtrainable.

A gentleman's chariot ſtanding in a coach-houſe belonging to a livery-ſtable keeper, is, it ſeems, liable to a diſtreſs; for that there is not a ſhadow of legal claim from the exemption.

But if a horſe goes with yarn, *&c.* to a weaver, *&c.* or fetches yarn from thence and carries it to a private houſe to be weighed, and it is hung there till the yarn be weighed, neither the horſe nor yarn can be diſtrained.

So, a horſe that brings corn to market, and is put into a private yard while the corn is ſelling, cannot be diſtrained; becauſe the bringing of the corn there is in the way of trade, and conſequently of public benefit.

So, goods in the poſſeſſion of a common carrier are protected from diſtreſs for the benefit of trade; as if they be delivered to him to put into a waggon in a private barn.

Neither can the horſe on which I am riding be diſtrained; for it is in uſe.

Nor can wearing apparel if in uſe be diſtrained; but wearing apparel not in uſe is diſtrainable for rent. 1 Eſp. R. 206.

The goods of a tenant are liable for a year's rent notwithſtanding outlawry in a civil ſuit.

Therefore, where a ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for rent, ſold the goods diſtrained, and afterwards the outlawry was reverſed: the officer was liable to pay the produce of the goods in an action for money had and received; for they were not *in cuſtodia legis*, the judgment being mere waſte paper. If during the time that he was in poſ- 7 T. R. 463, 4, 5.

ſeſſion under the outlawry, he was put to any expence in reaping and getting in the crops, he may maintain an action againſt the tenant to recover thoſe expences.—Even if the outlawry had not been reverſed, the landlord would have been entitled to a year's rent, becauſe a *capias utlagatum* at the ſuit of the party is to be conſidered only as a private execution.

By ſection 8. of the ſtat. 11 *G.* 2. *c.* 19. every landlord may take and ſeize, as a diſtreſs for arrears of rent, any cattle or ſtock of his tenant feeding or depaſturing upon any common appendant or appurtenant, or any ways belonging to any part of the premiſſes demiſed.

Gilb. L. of Diſt. 45, &c.

It ſeems to be now ſettled, that where beaſts eſcape, and come upon land by the negligence or default of their owner, and are treſpaſſers there, they may be diſtrained immediately by the landlord for rent arrear.

But where they come upon land by the inſufficiency of fences, which the tenant, being a leſſee, ought to repair, the leſſor cannot diſtrain ſuch beaſts, till they have been *levant* and *couchant*, and after that actual notice has been given to the owner that they are there, and he has afterwards neglected to remove them. But ſuch notice, it is ſaid, is not neceſſary where the diſtreſs is by the lord of the fee for an antient rent, or by the grantee of a rent-charge.

Therefore, where a ſtranger puts in his beaſts to graze for a night by the conſent of the leſſor and licence of the leſſee, yet the leſſor may diſtrain them for rent due out of thoſe lands which he conſented that the beaſts ſhould graze on; becauſe ſuch conſent was no waiver of his right to diſtrain, unleſs it had been expreſsly agreed ſo; for being but a parol agreement, it could not alter the original contract between the leſſor and leſſee, from which the power to diſtrain ariſes. The circumſtance of the beaſts being on the road to market does not privilege them from the diſtreſs.

As to cattle, therefore, the ſafeſt way is to drive them to a public inn; for an inn being *publici juris*, and every man having a right to put up at it, the cattle and goods of a gueſt are not diſtrainable there.

The privilege which exempts cattle and goods from being diſtrained

diſtrained at an inn ariſes from the circumſtance of their being there by authority of law; for common inns are ſo much devoted to the public ſervice that their owners are obliged to receive all gueſts and horſes that come to them for reception.

But the cattle or goods muſt be actually within the premiſſes of the inn itſelf, to be exempted from diſtreſs, and not in any place to which the tenant may have removed them for his convenience: for where a race-horſe was diſtrained for rent at a ſtable half a mile diſtant from the inn, the diſtreſs was determined to be a good one, and that the plaintiff had no remedy but againſt the inn-keeper.

It has been thought, however, by the Court of Chancery, that the grounds uſed with an inn ought to have the ſame privilege as the inn itſelf, and therefore that the cattle of ſtrangers or paſſengers ought not to be diſtrained there.

This privilege alſo extends, it ſeems, only to temporary gueſts, as a perſon who hires an unfurniſhed room in an inn by ſuch hiring becomes an under-tenant, and any furniture that he may have brought into ſuch room muſt be liable to the landlord's diſtreſs.

In a caſe where a rent-charge had been in arrear for twenty years, and cattle eſcaping out of the adjoining grounds, had been diſtrained for the arrears, the diſtreſs was relieved againſt in equity.—For a rent-charge the grantee cannot diſtrain a ſtranger's beaſts until they are *levant* and *couchant:* for this rent does not ſtand upon a feudal title, as rent-ſervice does, but is ſaid to be againſt common right; wherefore the ſtranger's beaſts muſt be ſo long reſident on the lands out of which the rent-charge iſſues, that notice may be preſumed to the owner of them; that is they muſt be lying down and riſing up on the premiſſes for a night and a day without purſuit made by the owner of them.

Whatever is part of the freehold is exempted from diſtreſs, for that which is part of the freehold cannot be ſevered from it without detriment to the thing itſelf in the removal; conſequently it cannot be ſuch a pledge as may be reſtored in the ſame condition to the owner: beſides that which is fixed to the freehold is part of the thing demiſed;

thoſe things therefore that ſavour of the realty are not diſtrainable.

This privilege extends to ſuch things as the tenant will not be permitted on any conſideration to remove with him from the premiſſes by reaſon of their being annexed to and conſidered as part of the freehold, and not becauſe they are abſolutely affixed to the freehold and cannot be moved therefrom; for a temporary removal of them for purpoſes of neceſſity is not ſufficient to deſtroy the privilege.

Thus, a ſmith's anvil on which he works is not diſtrainable; for it is accounted part of the forge, though it be not actually fixed by nails to the ſhop.

So, a mill-ſtone is not diſtrainable, though it be removed out of its proper place in order to be picked; becauſe ſuch removal is of neceſſity, and the ſtone ſtill continues to be part of the mill.

That which is in the hands and actual occupation of another cannot be diſtrained; for that cannot be a pledge to me of which another has the actual uſe.

So, wearing apparel cannot be diſtrained whilſt on the perſon of the owner; but if taken off, though merely for the purpoſe of natural repoſe, it may be diſtrained, upon the principle of not being in actual uſe.

Goods in the cuſtody of the law are not diſtrainable; for it is *ex vi termini* repugnant that it ſhould be lawful to take goods out of the cuſtody of the law: and that cannot be a pledge to me which I cannot reduce into my actual poſſeſſion.

Therefore goods diſtrained for damage feaſant cannot be taken for rent; nor goods in a bailiff's hands under an execution; nor goods ſeized by proceſs at the ſuit of the king, or taken under an attachment; nor will a replevin lie for them.

Neither can goods be diſtrained which have been ſold under execution of a writ of *fieri facias*, but ſo circumſtanced that it has not been proper to remove them from the premiſſes. Thus, where a tenant's corn while growing was ſeized and ſold under a *fi. fa.* and the vendee permitted it to remain till it was ripe and then cut it, after which, and before it was fit to be carried, the landlord diſtrained

diſtrained it for rent, both the Courts of K. B. and C. P. held that it was not diſtrainable. But where corn was taken in execution and ſold by the ſheriff under the ſtat. 2 *W. & M. c.* 5. *s.* 3. and the vendee permitted it after ſeverance to lie on the ground, the Court held it to be diſtrainable for rent.

A landlord having a legal right to diſtrain goods while they remain on the premiſſes, the iſſuing a commiſſion of bankrupt againſt the tenant, and the meſſenger's poſſeſſion of the goods of the tenant, will not hinder him from diſtraining for rent: and the aſſignment by the commiſſioners of the bankrupt's eſtate and effects is only changing the property of the goods, which while on the premiſſes remain liable to be diſtrained.

But if the landlord neglects to diſtrain, and ſuffers the goods to be ſold by the aſſignees, he can only come in *pro ratâ* with the reſt of the creditors.

In ſome caſes the diſtreſs itſelf is not protected even from a ſubſequent proceſs: thus where the queſtion was, whether goods were not liable to be ſeized on an immediate extent for the king's own debt, after a diſtreſs had been taken of the ſame goods by a landlord for rent juſtly due to him, before an actual ſale of the goods? the Court of Exchequer determined that the extent took place of the landlord's claim for rent, upon the authority of a much ſtronger caſe which had been before determined in that Court, in which the time for the ſale had expired and an attachment had been moved for againſt the ſheriff for not having executed the writ of *venditioni exponas*.

But if a replevin come after goods are ſold on the execution, the defendant muſt claim property; for then they are out of the cuſtody of the law and in the hands of a private perſon.

Laſtly, as every thing which is diſtrained is preſumed to be the property of the wrong doer, it follows that ſuch things wherein no man can have an abſolute and valuable property, as dogs, cats, rabbits, and all animals *feræ naturæ*, cannot be diſtrained.

Yet if deer, which are *feræ naturæ*, are kept in a private encloſure for the purpoſe of ſale or profit, this ſo far changes

their nature, by reducing them to a kind of ſtock or merchandize, that they may be diſtrained for rent.

When we ſpeak of chattels not diſtrainable, it muſt be underſtood with reference to the ſubject of this chapter, namely, as a remedy for the recovery of rent; for all chattels whatever are diſtrainable damage feaſant, it being but natural juſtice that whatever doth the injury ſhould be a pledge to make compenſation for it.

9 T. R. 298. Where a wrongful diſtreſs is made, and the party whoſe goods are ſo diſtrained pay money in order to redeem them, he may maintain trover againſt the wrong doer.

Diſtreſs, when, where, and how made. Gilb. L. of Diſt. 56, &c. With reſpect to the time, place, and manner of making a diſtreſs, it is to be obſerved, that

A diſtreſs for rent cannot be made in the night, [which ſeaſon is ſaid to be from after ſun-ſet till ſun-riſe,] becauſe the tenant hath not thereby notice to make a tender of his rent, which poſſibly he might do in order to prevent the impounding of his cattle.

The diſtreſs for rent muſt be for rent in arrear; therefore it may not be made the ſame day on which the rent becomes due, for if the rent be paid at any time during that day, whilſt a man can ſee to count it, the payment is good. Strictly indeed the rent is demandable and payable before the time of ſun-ſet of the day whereon it is reſerved; yet it is not due till the laſt minute of the natural day, for if the leſſor die after ſun-ſet, and before midnight, the rent ſhall go to the heir, and not to the executor.

But the cuſtom of a place, or an agreement between the landlord and tenant, if there be no objection to it in point of law, may empower the landlord to diſtrain for it earlier, for *conventio vincit legem.*

Therefore if a trader, after committing an act of bankruptcy, take a ſhop, and agree to pay a year's rent in advance, where by the cuſtom of the country half a year's rent becomes due on the day on which the tenant enters, the landlord after an aſſignment under the commiſſion, and before the year be expired, may diſtrain goods on the premiſſes for half a year's rent, or if he buy the tenant's goods, he may retain the amount of the half year's rent.

A diſtreſs muſt not be after tender of payment, for if the landlord

landlord come to diſtrain the goods of his tenant for rent, the tenant may, before the diſtreſs, tender the arrearages, and if the diſtreſs be afterwards taken, it is illegal. So, if the landlord have diſtrained, and the tenant make a tender of the arrearages before the impounding of the diſtreſs, the landlord ought to deliver up the diſtreſs, and if he does not, the detainer is unlawful.

A diſtreſs may be made for rent accrued after the expiration of a notice to quit, but it is a waiver of the notice, the taking of the diſtreſs being a proof of the landlord's intention to confirm the tenancy.

A diſtreſs for rent may be made though the leaſe be determined; for by ſtat. 8 *Ann. c.* 14. *s.* 6, 7. it is enacted, That it ſhall be lawful to diſtrain after the determination of the leaſe, in the ſame manner as if it had not been determined, provided the diſtreſs be made within ſix calendar months after the determination of the leaſe, and during the continuance of the landlord's title or intereſt, and alſo during the poſſeſſion of the tenant.

But where, by the cuſtom of the country, the off-going tenant is allowed any advantages reſpecting the premiſſes which he has quitted, as for example, a certain period within which to get in and diſpoſe of, or to threſh and keep his corn, &c. the intereſt and connection between the landlord and tenant is ſo continued by the operation of ſuch cuſtomary right, that the former is entitled to diſtrain for rent in arrear after ſix months have expired ſince the determination of the leaſe.

So, if a tenant dies, and his repreſentative enters upon the premiſſes, and continues therein until the end of the term, and afterwards, the landlord may at any time within the ſix months after the end of the term, under the reſtrictions preſcribed by the act, diſtrain for the arrears which were due at the time the original tenant died, as well as for what accrued afterwards.

No private perſon can diſtrain beaſts off his own land, or on the high road, which is privileged for the convenience of paſſengers and the encouragement of commerce.

But though chattels or pledges on the land only are to anſwer the lord's rent, yet if the lord comes to diſtrain,

and

and the tenant, ſeeing him, drives the cattle off the land, the lord may follow the beaſts and diſtrain out of his fee, if he had once a view of his cattle on his land. But if the beaſts go off the land of themſelves before the lord obſerves them, he cannot diſtrain them afterwards, as he might where the tenant drives them off.

Where there are ſeparate demiſes, there ought to be ſeparate diſtreſſes on the ſeveral premiſſes ſubject to the diſtinct rents; for no diſtreſs on one part can be good for both rents.

But where lands, lying in different counties, are held under one demiſe at one entire rent, a diſtreſs may be lawfully taken in either county for the whole rent in arrear; and chaſing a diſtreſs over is a continuance of the taking. But where the counties do not adjoin, a diſtreſs cannot be chaſed out of one county into the other.

By ſtatute 11 *G.* 2. *c.* 19. if any tenant for life, years, at will, ſufferance, or otherwiſe, ſhall fraudently or clandeſtinely convey his goods off the premiſſes, to prevent his landlord from diſtraining the ſame, ſuch perſon, or any perſon by him lawfully empowered, may in thirty days next after ſuch conveyance, ſeize the ſame wherever they ſhall be found, and diſpoſe of them in ſuch manner as if they had been diſtrained on the premiſſes.

But, by ſect. 2. of the ſame ſtatute, the landlord ſhall not diſtrain any goods which ſhall have been previouſly ſold, *bonâ fide*, and for a valuable conſideration, to any perſon not privy to ſuch fraud.

By ſect. 3. every tenant who ſhall ſo convey away his goods, and every perſon who ſhall knowingly aid or aſſiſt him therein, or in concealing the ſame, ſhall forfeit to the landlord double the value of ſuch goods.

By ſect. 7. of the ſame ſtatute, it is enacted, That where any goods or chattels, fraudulently or clandeſtinely conveyed off the premiſſes to prevent the landlord from diſtraining them for rent, ſhall be put, placed, or kept, in any houſe, barn, ſtable, out-houſe, yard, cloſe or place, locked up, faſtened or otherwiſe ſecured, it ſhall be lawful for the landlord, his ſteward, or other perſon impowered by him for that purpoſe, to take and ſeize as a diſtreſs for rent, ſuch goods

goods and chattels, (firſt calling to his aſſiſtance, the conſtable, headborough, borſholder, or other peace-officer of the hundred, diſtrict, or place where the ſame ſhall be ſuſpected to be concealed; and, in caſe of a dwelling houſe, oath being alſo firſt made before a juſtice of the peace, of a reaſonable ground to ſuſpect that ſuch goods or chattels are therein,) in the day time to break open and enter into ſuch houſe, barn, ſtable, out-houſe, yard, cloſe and place; and to take and ſeize ſuch goods and chattels for the arrears of rent, as he might have done if they had been in an open place.

If a landlord comes into a houſe and ſeizes upon ſome goods as a diſtreſs in the name of all the goods in the houſe, it will be a good ſeizure of all.

Diſtreſſes ought not to be exceſſive; but in proportion to the ſum diſtrained for, according to the ſtatute of *Marlbridge*, 52 *H.* 3. *c.* 4.

Thus, if the lord diſtrain two or three oxen for 12d. this is unreaſonable; ſo if he diſtrain a horſe or an ox for a ſmall ſum, where a ſheep or a ſwine may be had, this is an exceſſive diſtreſs.—But if there be no other diſtreſs on the land, then the taking of one entire thing, though of never ſo great value, is not unreaſonable.

As theſe diſtreſſes cannot be ſold, the owner upon making ſatisfaction, may have his chattels again.

By ſtat. 17 *C.* 2. *c.* 7. in all caſes, where the value of the cattle diſtrained ſhall not be found to be of the full value of the arrears diſtrained for, the party to whom ſuch arrears are due, his executors or adminiſtrators, may diſtrain again for the ſaid arrears.

But a ſecond diſtreſs cannot, it ſeems, be at all juſtified, where there is enough which might have been taken upon the firſt, if the diſtrainer had then thought proper: for in a caſe, where this queſtion occurred, it was reſolved, that a man who has an entire duty (as a rent for example) ſhall not ſplit the entire ſum, and diſtrain for one part of it at one time, and for the other part of it at another time, and ſo *toties quoties* for ſeveral times; for that is great oppreſſion.

But if a man ſeizes for the whole ſum that is due to him, and only miſtakes the value of the goods ſeized, which may

be

be of uncertain or imaginary value, as pictures, jewels, race-horſes, *&c.* there is no reaſon why he ſhould not afterwards complete his execution by making a further ſeizure.

For taking an exceſſive diſtreſs, a man is not liable to a criminal proſecution.

Neither can a general action of treſpaſs be maintained for an exceſſive diſtreſs.

But the remedy is by a ſpecial action founded upon the ſtatute of *Marlbridge*. On this ſtatute even there can be no remedy, where there is a remedy at the common law; nor if the plaintiff has recovered in replevin; for the action on the ſtatute is founded upon there being a cauſe of diſtreſs, of which the recovery in replevin ſhews there was none; moreover, in replevin, damages were recoverable for the taking, and a man ſhall not be permitted to ſay that there was a cauſe of diſtreſs, after he has recovered upon the ground of its being unlawful.

If any diſtreſs and ſale be made, as for rent in arrear and due, when in truth not any is due, in ſuch caſe the owner may recover double the value, with full coſts of ſuit, in an action of treſpaſs, or upon the caſe, on the ſtat. 2 *W. & M. ſeſs.* 1. *c.* 5. *s.* 5.

If the diſtreſs be made without cauſe the owner may make *reſcous*, that is reſcue it; but if it be impounded, he cannot break the pound and retake it, becauſe then it is in the cuſtody of the law.

Diſtreſs, how to be uſed.

Notice of the diſtreſs, with the cauſe of ſuch taking, muſt be given to the owner by the ſtat. 2 *W. & M. ſeſs.* 1. *c.* 5. *s.* 1.

As to the manner in which the diſtreſs is to be uſed and diſpoſed of; a diſtreſs is to be kept in a pound, which is nothing more than a public priſon for goods and chattels, and is either *overt*, or open, or *covert*, or ſhut. All living chattels are regularly to be put into the pound *overt*, becauſe the owner at his peril is to ſuſtain them, wherefore they ought to be put in ſuch an open place as he can reſort to for the purpoſe.

By the ſtat. 12 *Ph. & M. c.* 12. *s.* 1. no diſtreſs of cattle is to be driven out of the hundred, rape, wapentake, or lathe, where the ſame is taken, except it be to a pound *overt* within

within the ſame ſhire, not above three miles from the place where the ſame is taken; nor impounded in ſeveral places, whereby the owner may be conſtrained to ſue ſeveral replevins; on pain of forfeiting to the party grieved one hundred ſhillings, and treble damages.

By ſect. 2. of the ſame ſtatute, no perſon ſhall take for keeping in pound or impounding any diſtreſs, above fourpence for any one whole diſtreſs; and where leſs hath been uſed, there to take leſs; on pain of forfeiting 5*l.* to the party grieved, beſides what he ſhould take above fourpence.

But where lands lying in two adjoining counties were held under one demiſe at one entire rent, and the landlord diſtrained cattle in both counties for rent arrear, it was holden, that he might chaſe them all into one county: if the counties had not adjoined, it would have been otherwiſe.

The offence created by this ſtatute for impounding a diſtreſs in a wrong place, is but a ſingle offence, and ſhall be ſatisfied with one forfeiture, though three or four are concerned in doing the act, as the offence cannot be ſevered ſo as to make each offender ſeparately liable to the penalty; the meaning of the ſtatute being that the penalty ſhall be referred to the offence, not to the perſon.

As, where three perſons diſtrained a flock of ſheep, and ſeverally impounded them in three ſeveral pounds, whereby, *&c.* it was held, that they ſhould forfeit but one 5*l.* and one treble damages.

Treſpaſs will not lie againſt the pound-keeper merely for receiving a diſtreſs, though the original taking be *tortious*: for the pound is the cuſtody of the law, and the pound-keeper is bound to take and keep whatever is brought to him at the peril of the perſon who brings it; and if wrongfully taken they are anſwerable, not he; for when cattle are once impounded, he cannot let them go without a replevin or the conſent of the party. If however the pound-keeper goes one jot beyond his duty and aſſents to the treſpaſs, that may be a different caſe.

Neither can a pound-keeper bring an action if the pound be broken, but it muſt be brought by the party intereſted.

Beaſts, as is ſaid, ought to be put in a public pound; for

if they are placed in a private pound, the diſtrainer muſt keep them at his peril with proviſion, for which he ſhall have no ſatisfaction, and if they die for want of ſuſtenance, the diſtrainer ſhall anſwer for them.

Dead chattles however, as houſehold goods, *&c.* which may receive damage by the weather, muſt be put into a pound *covert*, otherwiſe the diſtrainer is anſwerable for them if they be damaged or ſtolen away, and this pound *covert* muſt be within three miles, and in the ſame county.

Now, by ſtat. 11 *G.* 2. *c.* 19. *ſ.* 10. any perſon diſtraining, may impound or otherwiſe ſecure the diſtreſs of what kind ſoever it be, in ſuch place or on ſuch part of the premiſſes as ſhall be moſt convenient; and may appraiſe and ſell the ſame, as any perſon before might have done off the premiſſes.

The diſtrainer cannot work or uſe the thing diſtrained, whether it lie in a pound *overt* or *covert*; becauſe the diſtrainer has only the cuſtody of the thing as a pledge: but the owner may make profit of it at his pleaſure.

An exception to this rule exiſts in reſpect to milch kine, which may be milked by the diſtrainer, becauſe it may be neceſſary to their preſervation, and conſequently of benefit to the owner. [Caſes in the books caſt ſome degree of doubt as to the legality of this *dictum* in *Cro. Jac.* 148. (ſee *Hunt's Gilbert's Law of Diſtreſs*, 74,) but the reaſon of the thing is ſo forcible, that we incline to think that the *dictum* of that day reſpecting this point, would be recogniſed as law at this period.]

The diſtrainer cannot tie or bind a beaſt in the pound, though it be to prevent its eſcape; for any act of the diſtrainer that tends to the injury of them is done at his peril.

But if cattle diſtrained die in the pound, without any fault of the diſtrainer; in ſuch caſe, he who made the diſtreſs ſhall have an action of treſpaſs, or may diſtrain again, if the diſtreſs was for rent.

If a diſtreſs be taken without cauſe, before it is impounded, the party may make a *reſcous*. But if it be impounded he cannot juſtify the breach of the pound to take it out of the pound, becauſe the diſtreſs is then in the cuſtody of the law

law; if however the pound be unlocked, it ſeems he may take them.

By the common law, if a man break the pound, or the lock of it, or any part of it, he greatly offends againſt the peace, and commits a treſpaſs againſt the king, and to the lord of the fee, the ſheriffs, and hundredors, in breach of the peace, and to the party in delay of juſtice; wherefore hue and cry is to be levied againſt him as againſt thoſe who break the peace: and the party who diſtrained may take the goods again, whereſoever he finds them, and again impound them.

Beſides which, by ſtat. 2 *W. & M. c.* 5. *s.* 4. on any pound-breach or *reſcous* of goods diſtrained for rent, the perſon grieved thereby ſhall, in a ſpecial action upon the caſe, recover treble damages and coſts againſt the offender, or againſt the owner of the goods if they be afterwards found to have come to his uſe or poſſeſſion.

In an action on this ſtatute, it has been adjudged, that the word "treble" ſhall be referred as well to the word "coſts," as to the word "damages," and conſequently that the coſts ſhall be trebled, as well as the damages. Indeed it is determined in general, that where a ſtatute gives treble damage, the coſts ſhall be trebled of courſe.

As to what ſhall be a *reſcous*, if the diſtreſs while being driven to the pound go into the houſe of the owner, who delivers them not, upon demand of them by the diſtrainer, this is a *reſcous* in law.

With reſpect to the diſpoſition of the diſtreſs, which being conſidered as a pledge could not at the common law be ſold; by the ſtat. 2 *W. & M. ſeſs.* 1. *c.* 5. *s.* 2. it is enacted, That where any goods ſhall be diſtrained for rent reſerved and due upon any demiſe, leaſe or contract whatſoever, and the tenant or owner of the goods diſtrained, ſhall not within five days next after ſuch diſtreſs taken and notice thereof, with the cauſe of ſuch taking, left at the chief manſion houſe or other moſt notorious place on the premiſſes, replevy the ſame; in ſuch caſe, the perſon diſtraining ſhall, with the ſheriff or under-ſheriff of the county, or with the conſtable of the hundred, pariſh, or place where ſuch diſtreſs ſhall be taken, cauſe the goods ſo diſtrained to be appraiſed

praiſed by two ſworn appraiſers, (whom ſuch ſheriff, under-ſheriff, or conſtable ſhall ſwear to appraiſe the ſame truly, according to the beſt of their underſtandings,) and after ſuch appraiſement may ſell the ſame for the beſt price that can be gotten for them, for ſatisfaction of the rent, and charges of the diſtreſs, appraiſement and ſale; leaving the overplus, if any, with the ſheriff, under-ſheriff, or conſtable, for the owner's uſe.

In the notice for the ſale of a diſtreſs under this ſtatute, it is not neceſſary to ſet forth at what time the rent became due for which the diſtreſs has been made.

If the perſon diſtraining is ſworn one of the appraiſers, it is illegal, for he is intereſted in the buſineſs; and the ſtatute ſays that *he*, with the ſheriff, *&c.* ſhall cauſe the goods to be appraiſed by two ſworn appraiſers.

The landlord muſt remove the goods at the end of five days, and will be deemed a treſpaſſer for any time beyond it that he keeps them. The five days allowed before a diſtreſs can be ſold, are incluſive of the day of ſale, wherefore it ſeems the diſtreſs may be removed on the ſixth day.

Thus, where a diſtreſs was made and a regular notice of ſale given on the 12th day of *May*, and on the afternoon of the 17th day of the ſame month the goods were removed and ſold, it was held that on the evening of the 17th five days from the time of the diſtreſs had completely expired, and that the removal and ſale were regular according to the time allowed by the ſtatute.

Notice to the owner is ſufficient as againſt him: unleſs a replevin had been ſued by the tenant, in which caſe, perſonal notice to the tenant is ſufficient to warrant a ſale under the ſtat. 2 *W. & M. ſeſs.* 1. *c.* 5. *s.* 2. and is preferable indeed, to notice left at the manſion-houſe.

Upon the ſale of ſuch diſtreſs the appraiſers need be ſworn by the conſtable only of the hundred in which the diſtreſs is impounded.

An irregularity in this proceſs does not now render the diſtrainer, as he was at the common law, a treſpaſſer *ab initio:* for by ſtat. 11 *G.* 2. *c.* 19. *s.* 19. it is provided, that where any diſtreſs ſhall be made for any kind of rent juſtly due, and any irregularity ſhall be afterwards done by the party

party diſtraining or his agent, the diſtreſs ſhall not be deemed unlawful, nor the diſtrainer a treſpaſſer, *ab initio*; but the party grieved may recover ſatisfaction for the ſpecial damage in an action of treſpaſs or on the caſe, at his election.

But, by ſect. 20, no tenant ſhall recover in ſuch action, if tender of amends had been made before the action brought: and, by ſect. 21, the defendant in ſuch action may plead the general iſſue and give the ſpecial matter in evidence.

Under the plea of the general iſſue, given by this act, a landlord cannot juſtify, except for acts done as landlord: therefore, although he may juſtify as far as the diſtreſs goes, he cannot under this iſſue juſtify expulſion. So alſo, if the goods remain on the premiſſes beyond the five days, he cannot juſtify, under this iſſue, entering the houſe to remove them afterwards, but muſt plead a licence to juſtify the aſportation, or *liberum tenementum* to juſtify the expulſion.

For goods ſold before five days have expired next after the diſtreſs and notice, an action of trover will not lie, that being a remedy which cannot be purſued ſince the ſtat. 11 *G.* 2. *c.* 19. as it tends to place the landlord in the ſame ſituation as he was before the paſſing of that act; the action ought to be brought ſpecially for the particular irregularity.

But though the tenant ſhall make ſatisfaction for the real damage only ſuſtained, by any irregularity in taking or diſpoſing of the diſtreſs; yet by the ſtat. 2 *W. & M. ſeſſ.* 1. *c.* 5. *s.* 3. if any diſtreſs and ſale ſhall be made for rent pretended to be due to the perſon diſtraining, where in truth no ſuch rent is due, the tenant ſhall recover double the value of the goods diſtrained, together with full coſts of ſuit.

Goods diſtrained by the plaintiff were delivered by him to the defendant on his promiſing to pay the rent: an action for money had and received would not lie for the value of the goods, though defendant do not pay the rent. 4 T. R. 687.

Where there are three joint leſſees, two of whom aſſign their intereſt to the third, whoſe ſole liability the landlord has not conſented to accept, the goods of the plaintiff being 3 Eſp. R. 8. 8 T. R. 309.

put on the premiſſes by permiſſion of ſuch third leſſee and diſtrained by the landlord for rent and he having paid it, the three leſſees are liable to him for money paid to their uſe.

SECTION II. *Of the Action of Debt, where the Leaſe is by Deed.*

Another remedy for the recovery of rent is by action of debt, or covenant, where the premiſſes are demiſed by deed.

1 Saund. 233. *n.* 1. An action of debt or covenant lies for non-payment of the rent on the word "yielding" in a leaſe for years; for it is an agreement to pay the rent, which will make a covenant.

Bull. N. P. 167. The action of debt is founded upon a contract, either expreſs or implied, in which the certainty of the ſum or duty appears, and the plaintiff is to recover the ſum *in numero*, and not in damages.

Eſp. N. P. 188. Debt, being an action founded on an expreſs contract, rents reſerved on leaſes for years were at all times recoverable by this ſpecies of remedy.

Cro Eliz. 169. 1 Str. 550. So, debt lies for rent upon a leaſe, though the defendant entered before his title began: for though clearly he is a diſſeiſor by his entry, and the accruing of his term ſhall not alter his eſtate, yet debt lieth for privity of contract; and whether the entry be tortious or not, it cannot diſcharge the contract for payment of the rent.

The ſtat. 8 *Ann. c.* 14. *ſ.* 4. enacts, That any perſons entitled to rent arrear on a leaſe for life or lives, may have an action of debt during the exiſtence of the life, as on a leaſe for years during the term.

By the ſtat. 32 *H.* 8. *c.* 37. *ſ.* 1. the executors and adminiſtrators of tenants in fee, fee-tail, or for life, of rent-ſervices, rent-charges, rents-ſeck and fee-farms, may bring debt for the arrearages againſt the tenant who ought to have paid the ſame. This ſtatute extends to all tenants for life.

Cro. Jac. 411. If one of two leſſees aſſign his intereſt, and the other die before the rent becomes due, an action of debt in the *debet et detinet* will lie againſt the aſſignee and executrix of the deceaſed leſſee for the whole rent.

Ibid. So, if the leſſee for years will aſſign all his term in part of the land, the leſſor ſhall have a joint action againſt the leſſee and aſſignee.

If

If there is a leſſee for years, and he aſſigns all his intereſt to another, yet may the leſſor ſtill have an action of debt againſt him for rent in arrear after the aſſignment: firſt, becauſe the leſſee ſhall not prevent by his own act ſuch remedy as the leſſor hath againſt him on his contract; 2dly, that the leſſee might grant the term to a poor man, who would not be able to manure the land, and ſo for need or malice the land would lie untilled, and the leſſor be without remedy, either by diſtreſs or action of debt. 1 Ld. Raym. 173. 4 T. R. 98.

But the leſſor may either tacitly or expreſsly accept the aſſignee for his tenant, and ſo diſcharge the original leſſee: and if he once accepts rent from the aſſignee, (who is bound however no longer than while in poſſeſſion) he can never reſort back again to the firſt leſſee. Eſp. N. P. 201. 4 T. R. 98.

The executor or adminiſtrator of a leſſee for years, may, like any other aſſignee, aſſign the term, and ſhall not be chargeable for rent after the aſſignment. *Ibid.*

If the leſſor aſſign his rent, without the reverſion, the aſſignee (if the tenant agrees) may maintain an action of debt for the rent, becauſe the privity of contract is transferred. 3 Salk. 118.

If the leſſor grant away his reverſion, he cannot have an action of debt for the rent, which being incident to the reverſion, paſſes with it.—The grantee of the reverſion, therefore, can alone have the action. Eſp. N. P. 202.

But the grantee even cannot have debt againſt the leſſee if he has aſſigned over; for there was no privity between them but by reaſon of the privity of eſtate, and that being gone by the aſſignment, this action will not lie. Such is the caſe, whether the perſon claiming the rent comes in by ſucceſſion or grant: thus, the ſucceſſor of a prebend cannot bring debt againſt the executor of a leſſee of the prebendary, where ſuch executor had aſſigned. Cro. Eliz. 328. *Ibid.* 555.

But if a leſſee aſſign part of the land demiſed, a grantee of the reverſion ſhall have debt againſt him for the whole rent: for the entire eſtate remaining in one part of the land, the privity remained entire, and would ſupport the action. *Ibid.* 633.

A deviſee may maintain debt for his ſhare of the rent, and if there be a deviſe of a rent to be equally divided between three, each may have his action for his ſhare. *Ibid.* 637.

6 Mod. 174. If a leſſee for years re-demiſe his whole term to the leſſor with a reſervation of rent, it operates as a ſurrender of the original leaſe, and therefore he cannot maintain debt for rent againſt the executor of the original leſſor; but muſt ſeek relief in equity.

Ibid. But if a leſſee aſſign his whole term to a ſtranger, he may bring debt for the rent reſerved on the contract againſt him or his perſonal repreſentatives.

1 Str. 405. So, if the leſſee for years aſſigns all his term to another, reſerving the rent to himſelf, he ſhall have an action of debt for the arrears during the term; for though not properly a rent for want of a reverſion, yet it partakes of its nature, being a return for the profits which are annual.

Cro. Eliz. 264. Rac. Abr. tit. Leaſes (S. 3. 1.) Debt does not lie for rent upon an expired leaſe. Therefore where leſſee for life made a leaſe for years, rendering rent, and afterwards ſurrendered to the leſſor upon condition: the leſſee for years took a new leaſe for years of the leſſor; the leſſee for life performed the condition, and put out the leſſee for years, who re-enters; and the leſſee for life brought debt for the firſt rent reſerved; and it was ruled that it was not maintainable, for the leaſe out of which it was reſerved was gone and determined; for though the ſurrender of the tenant for life, which made the leſſee for years immediate tenant to the firſt leſſor and ſo enabled him to make ſuch ſurrender, was conditional, yet the defeaſance of the eſtate for life, by performance of the condition, cannot defeat the eſtate of the leſſee for years, which was abſolute and well made, and then the rent reſerved thereon is gone likewiſe.

1 Lev. 25. Yet, if a leaſe be made to a woman *dum ſola* and ſhe marries, the term expires and ſhe dies; debt lies againſt the huſband for rent accruing during her life-time; for he is chargeable by reaſon of the perception of the profits.

Cro. Eliz. 78. So, in the caſe of a leaſe for years, rendering rent, and for non-payment the leaſe to be void; although the leaſe become void, yet for rent due before debt lies.

The Declaration. Salk. 109. In declaring in debt for rent on a leaſe for years, the plaintiff need not ſet forth any entry or occupation; for though the defendant neither enters nor occupies, he muſt pay

pay the rent, it being due by the leaſe or contract, and not by the occupation: therefore though it is uſual in the declaration to ſay "by virtue of which the leſſee entered," yet it is not neceſſary.

If rent is reſerved quarterly and half yearly, each gale is a diſtinct debt for which the leſſor may have his action, and may declare for an entire gale at the end of any quarter or half year without ſhewing how the former quarter or half year has been ſatisfied. But, if he declares only for part of the gale due at the end of any half year or quarter, it is bad, unleſs he ſhews how the remaining part was ſatisfied; for otherwiſe the leſſee may be expoſed to many actions for the ſame demand. Eſp. N. P. 212. 3 Salk. 218.

Whenever rent or any other duty is received [*Qu.* reſerved] quarterly or half yearly, the declaration ſhould always ſtate when it was due and ending, or it will be bad. *Ibid.*

So, if the plaintiff declares for leſs rent than a year, without ſhewing how the reſt was ſatisfied, it is bad; and no action will lie for half a year's rent if the rent be reſerved annually.

In debt for rent againſt the deviſee of the leſſee, the plaintiff muſt ſhew that the defendant entered by aſſent of the executor, or *virtute legationis*; and a demand muſt be made of the rent. Cro Eliz. 535, 6.

Where the plaintiff in his declaration undertakes to recite a leaſe, any mis-recital is fatal, if the action be founded on ſuch leaſe.

Thus, if a leaſe, upon which a groſs ſum and three fowls are reſerved by way of rent, is repreſented in pleading to have reſerved the groſs ſum without mentioning the fowls, the variance is fatal. 2 Ld. Raym. 792. Doug. 668.

In debt by a remainder-man for rent reſerved upon a leaſe by tenant for life, the plaintiff muſt ſhew what authority the tenant for life had to make the leaſe. 2 Ld. Raym. 792

The *venue* may be laid either where the land lies or where the deed was executed, or it ſhould ſeem in any place, if the action is againſt the original leſſee. 2 Salk. 651. 2 Str. 776.

But if the action is againſt the aſſignee of the leſſee, it muſt be laid where the land lies; for he is chargeable only on the privity of eſtate. *Ibid.*

Eſp. N. P. 213. So, againſt the executor of the leſſee, the action muſt be brought where the land lies; for he is chargeable as aſſignee on the privity of eſtate only.

1 Wils. 165. So alſo, debt for rent by the aſſignee of the leſſor againſt the leſſee, muſt be brought where the lands lie: but it is otherwiſe in the caſe of covenant which is tranſitory.

1 Saund. 1. *n.* 1. In debt for rent againſt an executor or adminiſtrator, if the whole rent has incurred in the life-time of the leſſee, the action againſt his executor muſt be in the *detinet* only: and the executor, though he do not enter, is ſtill chargeable in the *detinet*, becauſe he cannot ſo waive the term as not to be liable for the rent as far as he has aſſets.

Ibid. But for the rent incurred after the death of the leſſee, the action may be brought either in the *debet* or *detinet*, if the executor enters; for he is charged as aſſignee in reſpect of the perception of the profits, and it is not material whether he has aſſets or not. Therefore he cannot in ſuch caſe plead *plene adminiſtravit:* and if judgment be given againſt him, it is *de bonis propriis.*—But if the land be of leſs value than the rent, he may plead the ſpecial matter, *viz.* that he has no aſſets, and the land is of leſs value than the rent, and may pray judgment whether he ſhall be charged otherwiſe than in the *detinet* only. The leſſor has his election to charge him either in the *debet* and *detinet*, or the *detinet* only, in which latter caſe the judgment is *de bonis teſtatoris.*

Ibid. 112. *n.* 2. It ſeems ſufficient to declare againſt the defendant as executor, without naming him ſo in the beginning of the declaration.

1 Saund. 216. 219. & 237. *In n.* But after a judgment obtained againſt an executor, one may have debt in the *debet* and *detinet* ſuggeſting a *devaſtavit*, and thereby charge him *de bonis propriis*; for it is then properly his own debt; and a judgment againſt an executor or adminiſtrator by default, confeſſion, or after verdict, is an admiſſion of aſſets to ſatisfy the judgment; and if no aſſets are to be found, it is evidence of a *devaſtavit.*

Salk. 302. 1 Str. 412. An executor may bring an action before probate; but he cannot declare till probate be granted, for when he comes to declare he muſt produce his letters teſtamentary. If, however, the probate has been loſt, an exemplification from the ordinary will be ſufficient.

But

But an adminiſtrator cannot bring an action till adminiſtration be granted; for the power of an adminiſtrator is derived from the ordinary, as that of an executor is from the will. Eſp. N. P. 218.

Declarations by executors or adminiſtrators muſt be in the *detinet* only; for a perſon can only be ſaid to be the party to whom the money when received would belong, that is, to the teſtator's or inteſtate's eſtate, not to his executor or adminiſtrator. Such is the caſe, though the rent be reſerved on a demiſe which commenced on the death of the teſtator, ſo that he never received any rent. *Ibid.* Cro. Eliz. 840.

In actions by an executor, the declaration ſhould ſtate "that the teſtator was dead and the plaintiff compleat "executor." But if the executor has recovered and had judgment, and afterwards brings a *ſcire facias* on it, ſuch averment is not neceſſary; though it would be otherwiſe, had the *ſcire facias* been on a judgment obtained by the teſtator himſelf, for by the firſt judgment the teſtator's right was eſtabliſhed: but where the firſt judgment has been by the teſtator, the executor's right does not appear without ſuch averment. 1 Str. 631.

So, a declaration by an adminiſtrator is good, ſtating in general "that adminiſtration was granted to him by the "biſhop of, *&c.*" without ſaying that he was ordinary, or to whom the right to grant adminiſtration belonged; unleſs it be a peculiar juriſdiction, in which caſe it ſhould be ſet out. The reaſon is, that the defendant might conteſt the right of the perſon granting adminiſtration, or ſhew that adminiſtration was granted to another, or that there were *bona notabilia*. But a verdict would cure the fault; Cro. Eliz. 879.

In a declaration by an executor of an executor, he ſhould ſet out "that the firſt executor proved the will:" for otherwiſe the plaintiff has no title; for if there had been no probate granted to the firſt executor an adminiſtration *cum teſtamento annexo* ſhould be granted of the effects of the firſt teſtator to the next of kin. But this alſo would be cured by a verdict. 2 Str. 716.

An executor ſhould not join in the ſame declaration a demand by his teſtator, and one in his own right: for if he does, the writ will abate, as the judgments would be dif- *Ibid.* 1272.

ferent; that on the firſt would be *de bonis teſtatoris*, that on the latter *de bonis propriis*.

Eſp. N. P. 220. If the action is brought by the aſſignee of the reverſion againſt the leſſee for rent, he muſt ſet forth the ſeiſin in fee in the firſt tenant, and the ſeveral meſne aſſignments, down to himſelf; for theſe are neceſſary to make out his title, and the validity of theſe aſſignments being matter of law, ought to be ſet forth for the Court to judge of.

Ibid. For it is a general rule, that eſtates in fee-ſimple may be alledged generally, but the commencement of eſtates-tail, and other particular eſtates muſt be ſhewn, where they go to the ground of the action; but not ſo, where they are only inducement: the life therefore of the tenant in tail or for life ought to be averred.

Ibid. But where the action is by the leſſor or his heir againſt the aſſignee of the leſſee, the plaintiff need not ſet out the ſeveral meſne aſſignments to the defendant, for they do not lie within his knowledge: but it is ſufficient for the plaintiff to ſet forth the original demiſe to the firſt leſſee, whoſe eſtate and intereſt have by ſeveral meſne aſſignments come to the defendant; and proof of poſſeſſion and occupation ſhall be ſufficient to charge him.

Tidd's Pract. K. B. Reſpecting the *venue*, it may in addition be obſerved that, in debt for rent upon a leaſe, founded on the privity of eſtate, as when brought by the aſſignee or deviſee of the leſſor againſt the leſſee; or by the leſſor or his perſonal repreſentatives, againſt the aſſignee of the leſſee; or againſt the executor of the leſſee, in the *debet* and *detinet*, the action is local, and the *venue* muſt be laid in the county where the eſtate lies.—But in debt by the leſſor againſt the leſſee, or his executor in the *detinet* only, the action is tranſitory, and the *venue* may be laid in any county.

The Pleas. The pleas to an action of debt for rent reſerved on a leaſe by deed are, 1. *Nil debet*; 2. *Non eſt factum*; 3. *Riens in arrear*; 4. Entry and eviction; 5. Infancy.

2 Ld. Raym. 1503. Eſp. N. P. 233, 4. Tidd's Pract. K. B. 377. Wherever the debt is founded on the deed, the plea cannot contradict it: but there is a difference where the ſpecialty is but an inducement to the action and matter of fact is the foundation of it, for there *nil debet* is a good plea: as in debt for rent by indenture, for the plaintiff need not ſet out the indenture. Therefore the defendant may plead

nil

nil debet to debt for rent reſerved by indenture, which he could not do in the caſe of a bond; becauſe an indenture of leaſe does not acknowledge an abſolute debt as a bond does, for the debt ariſes from the enjoyment of the thing demiſed, and ſo is but inducement.

In debt for rent, where the plaintiff had declared for more than was due upon his own ſhewing, upon *nil debet* pleaded, he had judgment and damages and coſts, notwithſtanding; and it being moved in arreſt of judgment that the plaintiff had made an entire demand for rent to a certain ſum when it appeared that he could not have an action for ſo much, yet the Court held that he might releaſe the ſurplus and damages, and take judgment for the reſidue. 5 Mod. 214.

But, though the defendant may plead *nil debet*, he cannot give in evidence under it, that the plaintiff had nothing in the tenements, becauſe, had he pleaded it ſpecially, the plaintiff could have replied the indenture, and eſtopped him, or the plaintiff might demur; for the declaration being on the indenture, the eſtoppel appears on the record. Eſp. N. P. 234. Salk. 277. 6 T. R. 62. *c. p.*

But if the defendant plead *nil habuit, &c.* and the plaintiff will not rely on the eſtoppel, but reply *habuit*, the jury ſhall find the truth. Bull. N. P. 170.

Nil habuit in tenementis has been held to be a good plea on demiſe by deed-poll, becauſe, as to the leſſee, it is no eſtoppel.—It ſeems ſettled however that it is not admitted to be pleaded by a leſſee in any caſe: for the Court will not permit a tenant to impeach his landlord's title; nor indeed will an action for rent lie where the title is in diſpute. So, a tenant cannot ſet up the title of the mortgagee againſt the mortgagor; becauſe he holds under the mortgagor and has admitted his title. 3 Lev. 146. Eſp. N. P. 233. 5 T. R. 5. MSS. 1 T.R. 760. *n. a*

If in a leaſe ſpecial days of payment are limited by the *reddendum*, the rent muſt be computed according to that, and not the *habendum*. Salk. 141.

So, though in debt for rent on a demiſe by indenture, it is not neceſſary to declare that it was by indenture, but "*quod cum dimiſiſſet*" generally is ſufficient; yet if the defendant pleads *nil habuit in tenementis*, it is ſaid to be *prima facie* a good plea, becauſe no eſtoppel appears upon the record; and if the plaintiff replies that he had a ſufficient 6 T. R 62. 6 Mod. 258. 2 Ld. Raym. 1051, 4. 1 Saund. 276. *n.* 1 *Ibid.*

eſtate

eſtate to make the demiſe, he loſes the benefit of the eſtoppel; but if he replies (as he ought to do) that the demiſe was by indenture, and concludes *unde petit judicium*, if the defendant ſhall be admitted to plead the plea againſt his own acceptance of the leaſe by indenture, the defendant ſhall be ſtopped.

1 Salk. 277. 1 Saund. 325. *n.* 4

But where the declaration ſtates the leaſe to be by indenture, the plaintiff need not reply the eſtoppel, but may demur, becauſe the eſtoppel appears on the record: otherwiſe, as is before mentioned, if the declaration be "*quod* "*cum dimiſiſſet*," without ſaying that it was by indenture.

Eſp. N. P. 234.

If the leſſor accepts rent due at the laſt day of payment, and gives a diſcharge thereof and acquittance, this ſhall diſcharge all preceding arrears, and this would be good evidence on *nil debet*; for it is not preſumable that a man would give a receipt for the laſt gale of rent, when the former gales were unpaid.

Salk. 284. Cro. Eliz. 140.

So, if the defendant pleads "levied by diſtreſs" and ſo *nil debet*, he may give a releaſe or payment in evidence: and even though there never was any diſtreſs made, yet is the evidence of payment or the releaſe good; for the iſſue is on the debt, and the defendant proving it diſcharged, by any means, ſupports this iſſue.

Ibid. 222.

If the leſſor has covenanted to repair and bring debt for his rent, it ſeems that the leſſee may plead that he expended the rent in neceſſary repairs, and ſo owes nothing: but he muſt plead this ſpecially, and cannot give it in evidence on the general iſſue, for he might have covenant on it againſt the leſſor; wherefore alſo, if the leſſor had brought covenant for rent inſtead of debt, the leſſee could not plead expenditure in reparations at all, the remedy being reciprocal.

Bull. N. P. 176. 9 Mod. 60. 1 Ld. Raym. 420. 6 T. R. 650.

1 Lev. 152. Eſp. N. P. 234.

However, where there is an expreſs covenant in the ſame indenture, that the leſſee may deduct for charges and repairs, there clearly the defendant may plead it in bar to debt for rent.

Ibid. Bull. N. P. 170.

So, the defendant may plead *non eſt factum*; for, denying the exiſtence of the deed, there can be no eſtoppel.

Ibid. 171.

If the defendant plead *non eſt factum*, the plaintiff muſt prove the execution of the deed, and proof that one who called

called himſelf *B.* executed it, is not ſufficient, if the witneſs did not know it to be the defendant.

Under this plea, the defendant may give in evidence any thing that proves the deed to be avoided, though it were delivered as his deed; for the plea is in the preſent tenſe, and if it be avoided, it is not now his deed. *Ibid.*

But if the defendant plead raſure *& ſic non eſt factum*, nothing elſe is evidence but raſure. Salk. 284.

Riens in arrere is a good plea in debt for rent, though it would be bad in covenant for rent; for in covenant ſuch plea confeſſes the covenant broken, and goes only in mitigation of damages. Therefore, where the defendant pleaded "that nothing of the rent is in arrear and unpaid as by the "declaration is above ſuppoſed," it was held to be the ſame as if he had ſaid *nil debet*, and that it related to the time of the action brought, as well as that of the plea pleaded; for if the rent was due and is not at the time of the plea, it could not have ceaſed to be due, but by the plaintiff's accepting it; and if ſo, he waives the action, though it was well brought at the time. Eſp. N. P. 235. Cowp. 590.

Under this plea, the defendant may deny the validity of the leaſe. Cro. Eliz. 398.

Payment comes in queſtion under this iſſue.

Where the plaintiff gave a note of hand for rent arrear, and took a receipt for it when paid, the defendant afterward diſtrained for the rent, and the plaintiff brought treſpaſs: it was holden, that notwithſtanding this note, the defendant might diſtrain; for it is no alteration of the debt till payment. Bull. N. P. 182.

So, if a landlord accept a bond for rent, this does not extinguiſh it; for the rent is higher, and the acceptance of a ſecurity of an equal degree is no extinguiſhment of a debt. *Ibid.*

Entry and eviction of the whole or any part of the premiſſes demiſed, is a good plea in bar to an action of debt for the rent.

It muſt be a tortious entry and eviction, or expulſion, to occaſion a ſuſpenſion of the rent; a plea that ſtates a mere treſpaſs will not be ſufficient: for if the leſſor enter by virtue of a power reſerved, or as a mere treſpaſſer, yet if the leſſee be not evicted, it will be no ſuſpenſion of the rent. Cowp. 242. Bull. N. P. 177.

Therefore,

Cowp. 242. Therefore, where the leſſee pleaded in bar that the leſſor entered on the premiſſes and broke and pulled down the ceiling of a ſummer-houſe and tore up the benches, whereby the leſſee was deprived of the uſe thereof, without any eviction being ſtated, it was held to be bad.

Cro. Jac. 680. Debt was brought upon a leaſe for years of land in *D.* for rent arrear for a year and a half at the *Annunciation*, 19 *J.* 1. The defendant pleaded, and confeſſed the leaſe and reſervation; but further pleaded, that the leſſor and all thoſe whoſe eſtate, *&c.* had common in ten acres in *E.* always for their beaſts *levant et couchant* upon the ſaid tenements, every year after corn ſown, from *Auguſt* 7. until the corn reaped and carried away; and that before any rent was due, the leſſor incloſed the ſaid ten acres, wherein he ought to have had his common, with hedges and ditches, and ejected him, ſo as he might not uſe his common, and thereby his rent was extinct: whereupon it was demurred, (among other objections) that the land incloſed is not alledged to be ſown with corn; otherwiſe, by his preſcription, he is not to have common.

1 Saund. 204. n. 2. The plea muſt ſtate an eviction or expulſion of the leſſee by the leſſor, and a keeping him out of poſſeſſion until after the rent became due; otherwiſe it will be bad.

3 Mod. 35. 318. In debt for rent, it is optional for the defendant to plead the entry and expulſion by the plaintiff, or to give it in evidence upon *nil debet*.

Cro. Jac. 320. Infancy is another good plea in debt for rent: but a leaſe made to an infant is not void, but voidable only; and if it be beneficial to him, he is liable to an action for the rent reſerved.

Ibid. Therefore, where to debt for rent, the defendant pleaded infancy at the time of the leaſe made; on demurrer, the Court held that the leaſe was voidable only at the election of the infant, manifeſted by waiving the land before the rent-day came; but he not having done ſo, and being of age before the rent-day came, it was deemed an election, and the plaintiff had judgment.

Tidd's Pract. K. B. 379. 7 Mod. 198. The defendant may alſo plead payment at or after the day; for acceptance of rent may be pleaded in bar to debt for rent, though not to a recovery in covenant.

A ſet-off

A ſet-off may alſo be pleaded to a general iſſue in this action.

Touching this plea, it was firſt given by ſtat. *G.* 2. *c.* 22. which enacts, That where there are mutual debts between the plaintiff and defendant, or if either party ſue or are ſued as executors or adminiſtrators, where there are mutual debts between the teſtator or the inteſtate and the other party, one debt may be ſet off againſt the other, and ſuch matter given in evidence on the general iſſue, or pleaded in bar; but if intended to be given in evidence on the general iſſue, notice muſt be given of the particular ſum intended to be ſet off, and on what account it has become due.

The ſtat. 8 *G.* 2. *c.* 4. further enacts, That mutual debts may be ſet off againſt each other, notwithſtanding ſuch debts were of different natures, unleſs in caſes where either of the debts accrued by reaſon of a penalty contained in any bond or ſpecialty, in which caſe, the debt intended to be ſet off muſt be pleaded in bar, and in which plea ſhall be ſhewn how much is truly due on either ſide; and in caſe the plaintiff ſhall recover, judgment ſhall be entered for no more than appears to be due after one debt ſet againſt another.

The general iſſue mentioned in the ſtatute muſt be underſtood to mean any general iſſue.

With reſpect to the ſtatute of limitations, although the words of that ſtatute are general as to the limitation of all actions of debt for arrearages of rent, yet it has been adjudged that an action of debt for the arrearages of rent reſerved by indenture was not within the meaning of the ſaid ſtatute. 1 Saund. 38.

With reſpect to a releaſe, it is ſaid that it cannot be given in evidence without pleading; for it being a diſcharge by deed, all legal ſolemnities muſt be ſhewn to the Court. But this ſeems to be erroneous, for we have ſeen that under the plea of *nil debet*, a releaſe may be given in evidence; and a releaſe may be given in evidence under any general iſſue. Dyer 28. 12 H. 8. 1. Salk. 284. Cro. Eliz. 140. *Ante* p. 314.

A releaſe of all demands will not operate to releaſe rent before it becomes due, for then there is no demand; but it will releaſe rent then due. Salk. 578.

Therefore

Co. Lit. 292. *b.* Therefore if a man lets land to another for a year, yielding the rent at *Michaelmas*, and before *Michaelmas*, the leſſor releaſes to the leſſee all actions, yet after the feaſt the leſſor may have his action for rent, for the releaſe does not diſcharge it; for the rent is no debt till the day on which it is payable, as it is payable out of the profits of the land, and if the leſſee is evicted before the day, no rent is due; but the leſſor may diſcharge the leſſee of the rent before the day by a ſpecial releaſe.

Bull. N. P. 177. If the defendant inſiſts that the leaſe declared on is not the plaintiff's, the plaintiff muſt ſhew that it was made by one who had authority from him to execute it in his name, and the authority need not be produced. But the leaſe muſt be made and executed in the name of the principal.

Cro. Eliz. 700. In debt for rent by huſband and wife, upon a leaſe by her and her firſt huſband, it is a good plea that the firſt huſband was ſole ſeiſed, and that ſhe had nothing in the land.

Salk. 278. As to the evidence on the part of the defendant, if he plead *nil debet*, he may give the ſtatute of limitations in evidence; for the ſtatute is in the preſent tenſe, and ſo makes it no debt at the time of pleading.

Bull. N. P. 177. So, upon the ſame iſſue, he may give entry and expulſion in evidence.

The jury, beſides finding the debt, ought to give damages for the detention of it, which are uſually one ſhilling, though under particular circumſtances they may be more.

Tidd's Pract. K. B. 410. In debt for rent money may be paid into Court.

Salk. 659. Though the debt is by ſpecialty, yet if it depends upon

Ante, p. 313. ſomething extrinſic, as rent for example, the plaintiff may have a verdict for what is really due, though more is demanded.

8 Mod. 213. 12 Mod. 93. *ſ. c.* Therefore in an action of debt on a leaſe for rent, at 2 *l.* 13 *s.* a year, if the plaintiff declare for 100 *l.* due for ſo many years arrear, and it appears that a miſtake has been made, and that he has declared for 8 *l.* too much, yet after verdict if he releaſe the 8 *l.* he ſhall have judgment for the reſidue. So, if he demand more than upon his own ſhewing is due, he may, after demurrer, remit the overplus, and enter judgment for the reſt.

But

But as a ſum certain is always claimed, the verdict muſt go to the whole of it; that is, if the jury find part to be due, they muſt find *nil debet* as to the reſt. Co. Lit. 227. *a*

If there be judgment againſt two, and one of them dies, the plaintiff may have execution againſt the ſurvivor. Sir T. Raym. 26.

In an action for debt on bond for performance of covenants, the breach muſt be as particular as the covenant. 11 Mod. 312.

So, it was held, that the defendant in pleading to ſuch action covenants performed, muſt ſhew the indenture from the counterpart. However, as to ſuch particularity being requiſite *vide poſtea.* 6 Mod. 237. Doug. 667. &c.

In a debt on bond to perform all covenants, *&c.* a breach cannot be aſſigned for non-payment of rent, without ſhewing a demand, except performance be pleaded. Cro. Eliz. 828.

A demurrer to "a breach of covenant" after plea of "covenants performed" confeſſes the breach and contradicts the plea. *Ibid.* 829.

Yet to a plea of performance to debt on bond for breach of covenants a replication of non-payment of rent, without ſtating a demand, is good; for a denial of ſuch demand would have been a departure from the plea. Cro. Car. 76.

Where performance is pleaded, and matter of excuſe is afterwards ſet forth in the rejoinder, it is a departure; it ſhould have been pleaded in bar. Salk. 221.

In debt or bond conditioned for the payment of rent reſerved upon a demiſe according to certain articles, the defendant is eſtopped to ſay, that he had not any thing in the land demiſed by the articles. Cro. Eliz. 362.

Section III. *Of the Action of Covenant, where the Leaſe is by Deed.*

An action of covenant alſo lies by the landlord for the recovery of his rent, if the demiſe be by deed; for covenant is an action that lies for the recovery of damages for the breach of any agreement entered into by deed between the parties; but the agreement muſt always be by deed, though whether it be by indenture or deed-poll it equally lies. Eſp. N. P. 266. F. N. B. 145. L.

If the agreement be by indenture, it is ſufficient in order to maintain this action againſt the covenantor that he has Cro. Eliz. 212.

has ſealed it and delivered it to the covenantee, though the covenantee never ſealed it.

Eſp. N. P. 267. Doug. 766. Neither the word "covenant," nor any particular form of words, is neceſſary to conſtitute a covenant in deed; for any form of expreſſion under the hand and ſeal of the parties, importing an agreement, will ſupport this action, as amounting to a covenant.

Ibid. Thus, in the caſe of a leaſe of lands, in which are the words "yielding and paying" ſo much rent, this is an agreement for the payment of rent, which amounts to a covenant, and this action lies for the non-payment.

Carth. 135. So, if the leaſe be, yielding ſuch a rent, free and clear of all manner of taxes, charges, and impoſitions whatſoever, covenant lies if the leſſee do not pay the whole rent diſcharged of all taxes, before or afterwards impoſed.

2 Str. 763. 1 T. R. 310. The covenant to pay rent is abſolute, and if the tenant ſuſtains any injury, he may have his remedy, but cannot ſet it off againſt the demand for rent.

2 Str. 763. As where in covenant for a year's rent, from *Michaelmas* 1725 to 1726, the defendant ſhewed upon oyer of the leaſe, that he as leſſee by covenant was bound to repair in all caſes except fire, and then pleaded that before *Michaelmas* 1725 the premiſſes had been burned down, and not rebuilt by the plaintiff during the whole year, ſo that he had no enjoyment for the whole time claimed; on demurrer, the plaintiff had judgment notwithſtanding.

2 Saund. R. *n.* 1. Reſpecting executors and adminiſtrators, as in debt, ſo in covenant for rent incurred after the death of the leſſee, the leſſor has his election to charge the executor either as executor, in which caſe the judgment muſt be *de bonis teſtatoris*, or as aſſignee without naming him executor, but ſtating generally in the declaration, that the eſtate of the leſſee in the premiſſes lawfully came to the defendant, in which caſe the judgment ſhall be *de bonis propriis*.

Bac. Abr. tit. Covenant (E. 3.) The aſſignee of a term is bound to perform all the covenants annexed to the eſtate; as if *A.* leaſes to *B.* and *B.* covenants to pay rent during the ſaid term, and *B.* aſſigns to *C.* *C.* is bound to perform the covenants during the term though the aſſignee be not named; becauſe the covenant runs with the

the land being made for the maintenance of a thing *in eſſe* at the time of the leaſe made.

An aſſignee, however, is liable only in reſpect of his poſſeſſion, and not for a breach before aſſignment. Doug. 184. Salk. 199.

So, if a tenant who is chargeable with the rent aſſign over his intereſt in the land, the aſſignee is chargeable with the penalty for arrears incurred in his own time. Cro. Eliz. 383.

So, alſo, if a man leaſes for years, and the leſſee covenants for him and aſſigns, to pay the rent ſo long as he and they ſhall have poſſeſſion of the thing let, and the leſſee aſſigns, the term expires, and the aſſignee continues the poſſeſſion afterwards; an action of covenant will lie againſt him for rent behind after the expiration of the term, for though he is not an aſſignee ſtrictly according to the rules of law, yet he ſhall be accounted ſuch an aſſignee as is to perform the covenants. Bac. Abr. tit. Covenant (E. 3.)

As to the queſtion how far actual poſſeſſion is neceſſary in order to enable the leſſor to maintain covenant againſt the aſſignee, it has been decided that by the aſſignment the title and poſſeſſory right paſs, and the aſſignee becomes poſſeſſed in law; as therefore an aſſignee is only liable while in actual poſſeſſion if he aſſigns over before a breach, though his aſſignee has not taken actual poſſeſſion, yet he, (the firſt aſſignee) is not liable to any action of covenant. Doug. 444.

Thus, where the defendant was the aſſignee of the original leſſee, and covenant being brought againſt him for rent reſerved on the leaſe, he pleaded, That before the rent became due he had aſſigned all his intereſt in the premiſſes to one *Rigg*, who by virtue of ſuch aſſignment entered and was poſſeſſed: the plaintiff replied, that at the time when the rent became due, the defendant remained and continued in poſſeſſion *abſq. hoc*, That *Rigg* had entered, *&c.* and on demurrer it was held, that the aſſignment being admitted, the actual poſſeſſion was not ſufficient to charge the firſt aſſignee, the poſſeſſion in law being in the ſecond aſſignee by virtue of the aſſignment. *Ibid.*

But the leſſee being a party to the original contract continues always liable, notwithſtanding any aſſignment; for it is extremely clear, that a perſon who enters into an expreſs *Ibid.* 460.

4 T. R. 98. covenant in a leaſe continues liable on his covenant notwithſtanding the leaſe be aſſigned over.

Having in a preceding part of this work more particularly noticed the caſes in which the action of covenant lies againſt the leſſee and his aſſignee by deed or by law, and by the leſſor and his grantee or repreſentatives, we ſhall merely repeat a diſtinction that was before laid down, namely, that with regard to the queſtion how far the leſſee or aſſignee are chargeable in covenant, there is a conſiderable difference. 1ſt, The leſſee has from his covenant both a privity of contract and of eſtate; and though he aſſigns, and thereby deſtroys the privity of eſtate, yet the privity of contract continues, and he is liable in covenant notwithſtanding the aſſignment. But 2dly, the aſſignee comes in only in privity of eſtate, and is therefore liable only while in poſſeſſion.

Doug. 441. Eſp. N. P. 290.

The Declaration. 2 Str. 814. With reſpect to the pleadings on the part of the plaintiff, the declaration in an action of covenant ſhould ſet out expreſsly that the covenant was made by deed. *Per ſcriptum factum apud W. conceſſit*, does not import a deed; neither does an allegation that the party covenanted *per quoddam ſcriptum:* and if the inſtrument is ſet out upon error brought, and concludes with "in witneſs whereof, I have "hereunto ſet my hand and ſeal," it will not make good this defect.

3 T. R. 151. A deed may be pleaded as loſt by time and accident, without *profert*.

Doug. 667. This action being founded on a deed, the plaintiff need not ſet forth more than that part which is neceſſary to entitle him to recover: if he ſtates what is impertinent, it is an injury to the other party, and may be ſtruck out and coſts allowed, upon motion. When it is ſaid that the plaintiff need only ſet forth that part of the deed on which his action is founded, it is not meant that even that is neceſſary: for he is not bound to ſet forth the material part in letters and words; it will be ſufficient to ſtate the ſubſtance and legal effect; that is ſhorter and not liable to miſrecitals, and literal miſtakes: but what is alledged, ſhould be proved.

Cowp. 665. The proper mode, therefore, of declaring in covenant, is to ſet out that, by indenture, certain premiſes therein mentioned

tioned were demiſed, without ſtating them particularly, ſubject among other things to a proviſo; ſetting out the ſubſtance of the covenant, and the breach.

Breach that 3*l.* for a year at *Lady-day* laſt was arrear and unpaid, is well on a general demurrer wherein it was objected that it did not appear where the money became due. Salk. 139.

Where the covenant was "to pay or cauſe to be paid," the breach was ſufficiently aſſigned by ſtating that the defendant had not paid; without ſaying "or cauſed to be "paid," for had the defendant cauſed to be paid, he had paid, for *qui facit per alium facit per ſe.* 1 Str. 228.

In declaring againſt an aſſignee, the plaintiff may declare againſt him generally as aſſignee, without ſetting out the intermediate aſſignments; for he may not know them perhaps: and ſuch is the caſe, though the plaintiff himſelf is an aſſignee. 8 Mod. 72.

So, where the action is againſt the original leſſee, the breach need not extend to aſſigns; for the Court will not preſume an aſſignment. 5 Mod. 133. 11 Mod. 313. 1 Salk. 139. 1 Str. 228. *ſ. c.* Bull. N. P. 164.

The diſtinction proceeds from the difference that ſubſiſts between the caſe where a thing is to be done *by* a perſon or his aſſigns, and that in which it is to be done *to* a perſon or his aſſigns: in the firſt caſe, the breach muſt be aſſigned, in the diſjunctive, that it was not done "either by the one "or the other," but in the laſt caſe, it will be intended *primâ facie* to be done *to* the perſon himſelf; but if he aſſign his intereſt, then it may be done to the aſſignee, and if he did aſſign over his intereſt, it ought to be ſhewn on the other ſide. 5 Mod. 133. 12 Mod. 86. *ſ. c.* Salk. 139. *ſ. c.*

Where the action therefore is brought by the aſſignee of a term, the plaintiff muſt ſet forth in his declaration all the meſne aſſignments of the term down to himſelf; for he is privy to them, and therefore ſhall not be allowed to plead generally that the leſſee's eſtate of and in the demiſed premiſſes came to him, or to ſome other perſon under whom he claims, by aſſignment. 1 Saund. R. 111. *n.* 3.

But where an action is brought againſt an aſſignee of a term, ſuch general form of pleading is ſufficient, for the plaintiff is a ſtranger to the defendant's title, and therefore cannot ſet it out particularly. It is not ſufficient however, *Ibid.*

to say that the tenements came to the defendant by assignment, but it must be shewn that he is assignee of the term; for otherwise it might be an assignment of another estate than the term of the lessee: the usual form is "all the estate, right, title, and interest of the said *A.* (the lessee) of "in, and to the said demised premises, afterwards, to wit, on "*&c.* in the year of our Lord, *&c.* at *&c.* aforesaid, by "assignment came to the said defendant."

Cro. Eliz. 373, 436. So, in an action of covenant by an assignee, the declaration need not shew the deed of assignment; provided the subject in dispute may be assigned without a deed; although the covenant on which the action is brought ought to be by deed.

Cro. Car. 285. On an assignment of land by husband and wife, where they are seised to them and the heirs of the husband, it is sufficient to declare as assignee of the husband.

Cro. Eliz. 373; 437. The assignee of a lease which appears to be good only by estoppel, cannot maintain an action on the covenants.

Bull. N. P. 158. Tenants in common ought to join in the action of covenant for rent.

Ibid. Esp. N. P. 304, & 2 Str. 1146. Where there is a joint-covenant by several, all should join in the action, or on craving oyer and demurring generally, it will be bad.

Ibid. But if any named in the indenture have not sealed it, they should be excluded by an averment to that effect. But advantage must be taken by pleading in abatement, if the action be brought *against* part only of the covenantors.

Esp. N. P. 304. Where the plaintiff cannot sue on a breach of covenant, without some previous circumstances being by him performed, the declaration should aver the performance of them.

Ibid. 1 Salk. 80. Covenant for the non-payment of rent must be brought where the lands lie, though the rent be made payable in another place: as, where the lands lay in *Ireland*, and the rent was reserved to be paid in *London*, it was adjudged, that the action should be brought in *Ireland*.

Ibid. The distinction respecting the venue in this action, is this: in covenant by the grantee of the reversion against the assignee of the lessee the action is local, and the venue must be laid in the county where the estate lies.—But in covenant by the lessor or grantee of the reversion against the lessee,

leſſee, the action is tranſitory, and the venue may be laid in any county at the option of the plaintiff.

Touching the pleas to this action, in covenant there is, properly ſpeaking, no general iſſue; for though the defendant may plead *non eſt factum*, as in debt on ſpecialty, yet that only puts the deed in iſſue and not the breach of covenant; and *non infregit conventionem*, to a negative covenant, has been holden to be a bad plea. *The Pleas.* Tidd's. Pract. 375.

In this action therefore, the defendant muſt ſpecially controvert the deed, or ſhew that he has *performed* the covenant or is legally *excuſed* from the performance of it; or, admitting the breach, that he is *diſcharged* by matter *ex poſt facto* as a releaſe, &c. *Ibid.*

The pleas therefore to this action for breach of covenant for payment of rent, are 1. Performance. 2. Other covenants in bar. 3. *Non eſt factum.* 4. Entry and eviction. 5. A releaſe. 6. Accord and ſatisfaction. 7. Tender and refuſal. 8. *Riens in arrere*, or payment at the day. 9. Infancy.

A defendant cannot plead performance generally to negative and affirmative covenants. Cro. Eliz. 691.

Another covenant may be pleaded in bar, when they are both in the ſame deed; for the meaning of the parties is to be collected from the whole of the deed. Eſp. N. P. 306.

Thus, in covenant for rent, the defendant was permitted to plead another covenant in the ſame indenture, that he, as leſſee, might retain as much of the rent for repairs and charges. 1 Lev. 152.

But, generally, reciprocal covenants cannot be pleaded one in bar of another: and in aſſigning a breach of covenant it is not neceſſary to aver performance on the plaintiff's ſide. 2 Mod. 309.

Therefore, if *A.* covenant with *B.* to pay ſo much money for tithes, and to be accountable for all arrears of rent, and *B.* covenant to allow him certain diſburſements upon the account, *A.* cannot plead in an action of covenant, that he was ready to account if *B.* would allow him the diſburſements; for the covenants being mutual, each of them has a remedy againſt the other for non-performance. *Ibid.* 73.

Cowp. 56. So, unliquidated damages, arising from the breach of other covenants to be performed by the plaintiff cannot be pleaded by way of set-off.

Tidd's Prac. K. B. 404. But a set-off is allowable, by the statutes of set-off, in an action of covenant for non-payment of money, as for rent, and the demand intended to be set-off must be such as might have been the subject of an action either of debt, covenant, or *assumpsit*.

Bull. N. P. 180. In covenant upon an indenture for non-payment of rent, the defendant pleaded *non est factum*, and gave a notice of set-off; Mr. *J. Denton* at the assizes was of opinion, that he could not so do upon this issue, but upon a motion for a new trial the Court held, that the evidence ought to have been received, for the general issue mentioned in the act must be understood to be any general issue, and accordingly ordered a new trial.

2 Bl. Rep. 1153. Esp. N. P. 306. On the plea of *non est factum*, the issue is that there is no such deed as that stated in the declaration. The lessor's title, therefore, cannot on such plea be controverted.

Ibid. The defendant may, under this plea, shew that some of the covenants in the deed have been altered or erased, or he may plead it; for if any covenant be altered or erased, the whole deed is discharged: for the deed is a complication of all the covenants, so that by changing any, it remains no longer the same deed.

1 Saund. R. 204. a. 2. Entry and eviction is a good plea to an action of covenant, for rent is suspended by entry into any part. The eviction must be tortious and such as ousts the defendant of his possession; for a mere trespass will not suffice.—Entry and eviction must in covenant be pleaded; for it cannot, as in debt for rent, be given in evidence: and to a plea of eviction, the plaintiff may reply an entry by virtue of a power, and traverse the eviction.

Esp. N. P. 307. A release of all covenants is a good discharge of the covenant before it is broken: but a release of all actions, suits, and quarrels, would not be so; for at the time of the release, no debt, duty, or cause of action existed.

Ibid. Wherever a discharge is pleaded in the nature of a release, the defendant must plead it to be by deed, or it will be

be bad; for as the covenant is by deed, by deed only ſhall it be diſcharged.

It has been ſaid, that where a covenant runs with the land, and the leaſe has been aſſigned, if the covenantee had releaſed before a breach or action brought, it had barred the aſſignee even for a breach in his own time. [But this cannot, it is conceived, apply to a covenant for payment of rent: for as an aſſignee ſhall be bound by covenants that run with the land, ſo he ſhall take advantage of them; and were it otherwiſe, in the caſe of rent the covenantee might in fact defraud his aſſignee by defeating the eſtate that he aſſigned to him.] *Ibid.* 308. Cro. Car. 503. Bull. N. P. 159.

Accord and ſatisfaction is a good plea where there has been an actual breach; for not till then are damages claimable; and this plea goes in diſcharge of damages, not of the covenant itſelf, for that remains. Eſp. N. P. 308.

Therefore, where the plaintiff declared, that in conſideration that he would permit *S. P.* to enjoy a farm at *Chipſham* for one year, the defendant covenanted to pay the rent of 72*l.* *per ann.* and alſo 200*l.* then in arrear, and the breach aſſigned was the non-payment of the rent; the defendant pleaded, that "before any cauſe of action did "ariſe on the covenant, that it had been agreed between "him and the plaintiff, that the plaintiff ſhould take 30*l.* "in diſcharge of all covenants, which the plaintiff had ac-"cepted:" on demurrer, this plea was held to be a bad one, for at the time, there was no covenant broken, and accord and ſatisfaction is no good plea, except in diſcharge of damages for a covenant actually broken or damages ſuſtained. *Ibid.*

Tender and refuſal is alſo a plea to this action. The damages, not the debt, being for the moſt part the thing in demand by this action, tender and refuſal need not in general be pleaded with an *uncore priſt*. *Ibid.*

But where it is brought for rent, it being a debt aſcertainable and certain, it is beſt to plead this plea with an *uncore priſt*.

Riens in arrere, or payment at the day, is a good plea to covenant for non-payment of rent. But "levied by diſ- Eſp. N. P. 309.

"treſs," cannot be pleaded; for that is a confeſſion that it was not paid at the day, to which time the breach refers.

Infancy is another plea in this action, which may or may not be good according to circumſtances: *vide* p. 87, & 111.

Ibid. If the defendant has leave to plead double, under the ſtat. 4 & 5 *Ann. c.* 16. he ſhall not be allowed to plead inconſiſtent pleas, as *non eſt factum*, and a condition precedent.

4 Bur. 2444. Bankruptcy is no plea to a covenant to pay rent, for beſides that the rent was not a debt due at the time of the bankruptcy, and ſo could not be proved under it, it is a ſettled principle, that the tenant's liability on his covenant

8 T. R. 61. to pay rent, ſubſiſts during the continuance of the leaſe, notwithſtanding he may become a bankrupt and be deprived of all his property: but of the aſſignee of tenant, otherwiſe.

Tidd's Pract. K. B. 409. Eſp N. P. 310. In an action of covenant for rent, the count being for a liquidated ſum, money may be paid into Court.

Ibid. 5 Mod. 213. Reſpecting the verdict and judgment in this action; in covenant for non-payment of rent at divers days which amounts to ſo much, and in the declaration the ſum is miſcaſt, it is not error, but the plaintiff ſhall have a verdict for ſo much as is really in arrear.

Cro. Eliz. 685. Judgment cannot be given on two covenants where one is bad; therefore where a general verdict was given, in ſuch caſe, and entire damages, judgment was arreſted.

2 Lev. 63. So, if covenant be brought againſt two, and there be judgment by default againſt one, and the other pleads performance; which is found for him, the plaintiff ſhall not have judgment againſt the other; for on the whole, the plaintiff has no cauſe of action.

SECTION IV. *Action of Debt, for Uſe and Occupation.*

An action of debt will alſo lie, or of aſſumpſit for uſe and occupation where rent is in arrear by a tenant who holds under a leaſe not by deed; as under a writing without deed, or a parol demiſe.

Of Debt. Firſt, with reſpect to the action of debt.

This

This action, we have before obſerved, is founded upon a contract, either expreſs or implied, in which the certainty of the ſum or duty appears, and the plaintiff is to recover the ſum *in numero* and not in damages. Bull. N.P. 167.

It was formerly held that in declaring on a leaſe at will for rent arrear, the plaintiff muſt ſhew an occupation; for the rent being only due in reſpect thereof, it ſhould appear to the Court when the leſſee entered and how long he occupied. But this is now held to be unneceſſary; for Salk. 209.

Where there was a tenant at will, (now deemed a yearly tenant) with a rent reſerved, the leſſor might always have an action of debt for arrears of rent. Eſp. N. P. 188.

Againſt tenants at ſufferance, it ſeems that an action of debt lay not for rent arrear, for the contract was determined, and they are in by wrong: but in ſuch caſes there is now a ſpecial proviſion.

For by ſtat. 4 *G.* 2. *c.* 28. *s.* 1. it is enacted, That if any tenant or tenants for life, or lives, or years, or perſons coming in under or by colluſion with them, hold over any lands, tenements, *&c.* after the determination of their eſtates, after demand made and notice in writing given, for delivering the poſſeſſion thereof by the landlord, or the perſon having the reverſion or remainder therein, or his agent thereunto lawfully authorized, ſuch tenant or tenants ſo holding over, ſhall pay to the perſon ſo kept out of poſſeſſion at the rate of double the yearly value of the lands, tenements, *&c.* ſo detained, for ſo long a time as the ſame are detained; to be recovered by action of debt, whereunto the defendant or defendants ſhall be obliged to give ſpecial bail. *Where a tenant holds over; for double value.*

Alſo, by ſtat. 11 *G.* 2. *c.* 19. *s.* 18. it is enacted, That in caſe any tenant or tenants ſhall give notice of his, her, or their intention to quit the premiſſes, and ſhall not accordingly deliver up the poſſeſſion thereof at the time in ſuch notice contained, the ſaid tenant or tenants, his, her, or their executors or adminiſtrators, ſhall from thenceforth pay to the landlord double the rent or ſum which he, ſhe, or they ſhould otherwiſe have paid. *For double rent.*

Upon theſe ſtatutes it has been held, that

With reſpect to the 4 *G.* 2. it is a remedial law; the penalty being given to the party aggrieved. 5 Bur 2698.

The

2 Bl. R. 1076. The notice to quit may be before the expiration of the leaſe or time of demiſe.

5 Bur. 1076. The notice in writing is of itſelf a ſufficient demand, within the words of the ſtatute "after demand made, and "notice in writing given."

Ibid. A receiver appointed under an order of the Court of Chancery is "an agent lawfully authorized" within the words of the ſtatute.

2 Bl. R. 1077. One tenant in common may maintain this action for double value of his moiety; for where the injury is ſeparate, tenants in common may have ſeveral actions.

Cowp. 246. The acceptance of (ſingle) rent accrued ſince the notice, is, it ſeems, a waiver of the landlord's right to double rent, but does not neceſſarily imply that the tenancy ſhould continue.

3 Bur. 1607. With reſpect to the ſtat. 11 *G.* 2. a parol demiſe from year to year is a ſufficient holding within the ſtatute ſo as to ſubject the tenant to the penalty of double rent, if he hold over after he has given notice to quit.

Ibid. The notice by the tenant to quit, need not be in writing; a parol notice to quit is ſufficient.

By ſtat. 11 *G.* 2, *c.* 19. *ſ.* 12. it is enacted, that every tenant to whom any declaration in ejectment ſhall be delivered for any lands, *&c.* ſhall forthwith give notice to his or her landlord, or his bailiff or receiver, under the penalty of forfeiting the value of three years improved or rack-rent of the premiſſes to the perſon of whom he or ſhe holds; to be recovered by action of debt.

6 T. R. 62. Debt will lie for uſe and occupation generally, without ſetting forth the particulars of the demiſe.

Ibid. n. b. Therefore, in a caſe, where to a count for uſe and occupation generally, the defendant demurred and aſſigned for cauſes that it did not ſet forth any demiſe of the premiſſes, nor for what term they were demiſed, nor what rent was payable, nor for what length of time the defendant held and occupied the premiſſes, nor when the ſum of 5 *l.* thereby ſuppoſed to lie due became due, nor for what ſpace of time; after argument, the Court of Common Pleas gave judgment for the plaintiff on that count.

But

But if the particulars of a demiſe be alledged, they muſt be proved.

Therefore, in an action for double rent on the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 18. where the declaration ſtated a leaſe for three years, but on the evidence it appeared, that the leaſe for three years was void under the ſtatute of Frauds, and that the defendant was only tenant from year to year; though this was ſufficient for the action, yet a leaſe for three years having been laid, and not proved, the plaintiff was nonſuited. Doug. 662.

Debt againſt an executor ſhall be in the *detinet* only; for he is chargeable no farther than he has aſſets. Bull. N. P. 169.

An adminiſtrator may be declared againſt as aſſignee in debt for rent, for the time that he enjoyed the land and was in poſſeſſion: and muſt be in the *debet* and *detinet*. Eſp. N. P. 217. Bull. N. P. 169.

An executor muſt bring debt in the *detinet* only, though this would be aided after verdict by the ſtatutes of Jeofails.

In debt for rent on a demiſe in writing without deed or by parol, the proper plea is *non demiſit*. *The Pleas.* *Ibid.* 170.

Entry and eviction is a good plea to this action; ſo as it be ſuch a tortious entry and expulſion as to prevent an enjoyment of the premiſſes. Eſp. N. P. 233.

The ſtatute of Limitations, 21 *J.* 1. *c.* 16. which enacts, That all actions for rent arrear, or grounded on any lending or contract without ſpecialty, muſt be brought within ſix years, is another good plea: and ſuch plea muſt conclude with a verification, as when pleaded to an action of *aſſumpſit*. 1 Saund. 283. *n* 2.

Infancy ſeems to be another valid plea: but ſee the reaſons wherefore it ſhould or ſhould not be pleaded, *ante* p. 328.

So a plea of ſet-off: and alſo a tender and refuſal. So a releaſe.

Where to debt for rent on a demiſe of three rooms, the plea was, that the plaintiff demiſed the ſaid three rooms and another room, and that he entered into the other room, but did not traverſe the demiſe of the three rooms only, it was held to be bad for want of ſuch a traverſe. 1 Saund. 206.

It is now ſettled that in an action of debt on a ſimple contract, as this is, the plaintiff may prove and recover a leſs ſum than he demanded by his writ. H. Bl. R. 249.

Section V. *Of Aſſumpſit for Uſe and Occupation.*

A ſecond remedy for the recovery of rent, where the demiſe is not by deed, lies by action of *aſſumpſit* for uſe and occupation.

2 Lev. 150. Bull. N. P. 138.

At common law, it was holden, that *aſſumpſit* would lie for rent on an expreſs promiſe, but not on an implied promiſe, and that ſuch expreſs promiſe muſt have been made at the ſame time with the leaſe. But now,

The ſtat. 11 *G.* 2. *c.* 19. *s.* 14. in order to obviate ſome difficulties that many times occur in the recovery of rent, where the demiſes are not by deed, enacts, That it ſhall be lawful for the landlord, where the agreement is not by deed, to recover a reaſonable ſatisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, in an action on the caſe, for the uſe and occupation of what was ſo held or enjoyed; and if in evidence on the trial of ſuch action any parol demiſe or any agreement (not being by deed,) whereon a certain rent was reſerved, ſhall appear, the plaintiff in ſuch action ſhall not therefore be nonſuited, but may make uſe thereof as an evidence of the *quantum* of the damages to be recovered.

2 Bl. R. 1250. 3 Wilſ. 276.

Where there is a note in writing expreſſing the *quantum* of rent or the duration of the term, evidence of a parol agreement to annul or ſubſtantially to vary the written contract, is inadmiſſible; elſe the ſtatute of Frauds would be eluded, and the ſame uncertainty introduced by ſupplettory or explanatory evidence, which that ſtatute has ſuppreſſed in reſpect to the principal object.

2 Bl. R. 1249.

Thus, where there was a written agreement that a leaſe ſhould be let of a houſe at 26*l.* *per ann.* on which an action was brought for uſe and occupation; the defendant paid 26*l.* into Court. At the trial, the plaintiff offered to give parol evidence, that beſide the 26*l.* *per ann.* the defendant was to pay the ground landlord 2*l.* 12*s.* 6*d.* but this evidence was rejected; particularly as no evidence was offered of the actual payment of ſuch rent.

3 T. R. 528. 6 T. R. 464.

Parol evidence, indeed, of a verbal agreement cannot be received where it appears that it was reduced to writing; and this, even where the written agreement, for want of being

being ſtamped, or for other informality or defect, was inadmiſſible: for parol evidence cannot be admitted to vary the ſubſtance of a written agreement.—With reſpect to collateral matters, however, it is otherwiſe; for a perſon may ſhew by parol proof who is to put a houſe in repair, or the like, concerning which nothing is ſaid in the written agreement. So, it may be admitted to explain a deed or other inſtrument; or to prove other conſiderations than thoſe expreſſed in a deed. 2 Bl. R. 1250. 2 Str. 794. *in notis.*

This action being founded on a contract either expreſſed or implied, it is a general rule, that wherever the defendant uſes or enjoys premiſſes by permiſſion of the plaintiff [as his tenant,] he ſhall be liable in this action. 8 T. R. 327.

So, this action may be maintained by a grantee of an annuity, after a recovery in ejectment againſt a tenant who was in poſſeſſion under a demiſe from year to year, for all rent in his hands at the time of the notice by the grantee, and down to the day of the demiſe; but not afterwards. 1 T. R. 378.

So, after a recovery of poſſeſſion of the premiſſes, the plaintiff is entitled to the profits for uſe and occupation, to the time of the demiſe, but not after, if he thinks fit to ſue for them. Cowp. 246. 1 T. R. 387.

But an action for uſe and occupation and an ejectment, when applied *at the ſame time*, are totally inconſiſtent: for in one, the plaintiff ſays that the defendant is his tenant, and therefore he muſt pay him rent; in the other, he ſays that he is no longer his tenant, and therefore muſt deliver up the poſſeſſion. He cannot do both. *Ibid.*

This action therefore being founded on a contract expreſs or implied, will not lie where the poſſeſſion of the tenant is adverſe and tortious; unleſs indeed the plaintiff ceaſes to conſider it as ſuch, by waiving the tort, and recurring to his remedy by this action on the contract. *Ibid.*

The defendant in this action, as in all actions for rent, is not admitted to call in queſtion the plaintiff's title to the premiſſes; or in any way to impeach it.

Therefore, in an action for uſe and occupation by an incumbent againſt a tenant of the glebe lands, the defendant cannot give evidence of a ſimoniacal preſentation of the plaintiff, in order to avoid his title. 5 T. R. 5.

So,

Eſp. N. P. 21. So, in an action for uſe and occupation, the plaintiff having given evidence of payment of rent by the defendant for nineteen years, the defendant would have gone into evidence to prove a title in another. *Per Wilmot* J.—Payment of rent and holding under a perſon for ſo long a time, is concluſive evidence againſt the defendant, and he cannot ſet up a title in another: and as to the objection that has been made, that the defendant may be liable to two actions for the rent, by perſons having different titles, that cannot be the caſe; for though another has title, yet he cannot bring an action for the rent till he has made an entry, and recovered in ejectment; [which entry need not now be actually made in ſuch caſe, but is ſuppoſed, 3 *Bur.* 1895. *Run. Eject.* 199.] and then it muſt be treſpaſs for the meſne profits. [But *vide* p. 335.]

Ibid. ſ. a. But it was agreed, that though a defendant cannot controvert the title of the plaintiff, yet he may give evidence to explain the holding under him, as that he was executor during the minority of *A. B.* and that his intereſt was then determined; for that admits the plaintiff's title, during the time the defendant held under him.

By the above mentioned ſtatute (11 *G.* 2. *c.* 19.) *ſ.* 15. it is enacted, That where any tenant for life ſhall happen to die before or on the day on which any rent was reſerved or made payable upon any demiſe or leaſe of any lands, *&c.* which determined on the death of ſuch tenant for life, that the executors or adminiſtrators of ſuch tenant for life ſhall and may, in an action on the caſe, recover of and from ſuch under-tenant, if ſuch tenant for life die on the day on which the ſame was payable, the whole, or if before ſuch day then a proportion of ſuch rent, according to the time ſuch tenant for life lived, of the laſt year, or quarter of a year, or other time in which the ſaid rent was growing due.

Ambler, 198. In a caſe in the Court of Chancery, wherein a tenant in tail made a leaſe for years and died a week before the rent became due, without iſſue, Lord *Hardwicke* held that his executor was entitled to an apportionment of the rent; for though tenant for life only is mentioned, yet he, as to this, is a tenant for life. In the ſame caſe, his Lordſhip

was of opinion, that tenant for years, determinable on lives, was within the miſchief of the ſtatute.

An executor brought an action for rent due to his teſtator in his life-time, and for other rent due in his own time, and there was another count on a *quantum meruit* for the rent of another meſſuage, in which he had not declared as executor. After judgment by default and a writ of enquiry executed, upon error brought, judgment was reverſed, becauſe the demands were incompatible:—but perhaps it would have been helped by a verdict, becauſe for rent due in his own time, he need not declare as executor; and therefore, if it had been tried, the Judge ought not to have permitted him to prove rent due to himſelf in his own right. 2 Str. 1272. *et n.* 1.

An action for uſe and occupation will not lie, where the premiſſes are let for a purpoſe illegal, or *contra bonos mores*; as to a proſtitute. Eſp. R. 13.

An action for rent will not lie where the title is in diſpute: the Court therefore will not try a title by the action for uſe and occupation; an ejectment is the proper remedy. This was decided in a caſe before the Court of King's Bench, by Lord *Kenyon* C. J. wherein the action was brought againſt the tenant for rent, while the heir at law and a deviſee were conteſting their right to the premiſſes. MSS. Hil. T. 37 G. 3.

The Pleas.

An *aſſumpſit* under the ſtatute for uſe and occupation of a houſe by permiſſion of the plaintiff, *nil habuit in tenementis* is a bad plea; for the action is founded on the promiſe, and therefore if the plaintiff had an equitable title or no title at all, yet if the defendant enjoyed by his permiſſion, it is ſufficient; for it is no more neceſſary for the plaintiff to ſay that it was his houſe, than in *aſſumpſit* for goods it is neceſſary to ſay that they were his goods. 1 Will. 314. Bull. N. P. 139. Eſp. N. P. 165.

But the plea would be good at common law, for there an intereſt is ſuppoſed to have paſſed from the leſſor.—Yet *quære* whether at this day ſuch plea would be admitted, even in an action for rent at common law; for if it would, the ſuppoſition of an intereſt having paſſed would be a fiction, not in furtherance of the ends of juſtice, but in deſtruction of them; and the rule laid down by Lord *Kenyon*, that "in an action for uſe and occupation it ought not to *Ibid.*

"be

" be permitted to a tenant, who occupies by the licence of " another, to call upon that other to ſhew the title under " which he let the land or premiſſes," is not a mere technical rule, but is founded on public convenience and policy; and as it was adopted by the Court, in conformity to the recognition of it in caſes prior to the one then before them, as well as on the grounds of reaſon and equity, it may be now conſidered as a general rule, applicable to all caſes of a ſimilar kind.

Bull. N. P. 151. The defendant may in this action, upon the plea of *non aſſumpſit*, which is the general iſſue, give in evidence any thing which proves nothing due, as the delivery of corn or any other thing in ſatisfaction; or a releaſe; ſo he may give in evidence, performance. In ſhort, the queſtion in *aſſumpſit* upon the general iſſue is, whether there was a ſubſiſting debt, or cauſe of action, at the time of commencing the ſuit: therefore, though a diſtinction has been taken that payment or any other legal diſcharge muſt be pleaded; yet that diſtinction is not law; but in both caſes, the defendant is allowed to give in evidence any thing that will diſcharge the debt.

Tidd's Pract. K. B. 374.

Bull. N. P. 152.

Tidd's Pract. K. B. 375. But matters of law, in avoidance of the contract, or in diſcharge of the action, are uſually pleaded; and it is neceſſary to plead a tender, ſet-off, or the ſtatute of Limitations.

CHAPTER

CHAPTER XIV.

Of the Remedies for and againſt Landlord and Tenant; wherein

Of the Actions of Ejectment and Treſpaſs for Meſne Profits for Recovery of Rent and Poſſeſſion.

SECTION I. *Of the Action of Ejectment at Common Law.*

SECTION II. *Of the Action for Meſne Profits.*

SECTION III. *Of a ſecond Action of Ejectment.*

SECTION IV. *Of the Action of Ejectment upon the Statute* 4 G. 2. c. 28.

SECTION V. *Of the Landlord's Remedy under the Statute* 11 G. 2. c. 19. *where the Premiſſes are vacant.*

SECTION I. *When an Ejectment lies, and the Proceedings therein at Common Law.*

OF the various remedies which the law affords for the breach of a contract or the reparation of a wrong, none perhaps ſo intimately concerns the reſpective relations of landlord and tenant, as that admirable fiction of the courts of common law, called the action of ejectment.

Beſides the remedy given to a landlord, where the leaſe contains a clauſe of re-entry on non-payment of rent, by the ſtat. 4 *G.* 2. *c.* 28. *ſ.* 2. of which hereafter,

The action of ejectment lies at common law to recover poſſeſſion, on

The expiration of the leaſe by effluxion of time; or

The determination of the leaſe by

Non-payment of rent, or

Non-performance of covenants.

Where the poſſeſſion is vacant, or

Where the tenant is in poſſeſſion.

In order, however, to explain the action as applicable to these particular cases, we must go into a general account of the nature of the remedy by ejectment.

History of the Action. 2 Sell. Pract. 162.

By the antient common law, the only method of recovering the possession of land was by real action by writ of entry or assise, and this in no case where the estate was less than freehold; for a mere leasehold interest or term for years was, in the early period of our constitution, when feudal principles more strictly prevailed, deemed of such little import, that no remedy was provided, whereby the tenant could regain his possession in case he was ousted by his landlord or by a stranger: against the former he could proceed only upon his breach of covenant or agreement; against the latter indeed he might have his writ of ejectment, by which however he could recover damages only, and not the possession.

Ibid. 162.

In those times the ejectment was a mere personal action of trespass, and the proceedings were by *pone*, or by *capias* and distress infinite.

Ibid.

In process of time,—some say so early as the reign of *Ed.* 4. (3 *Bl. Com.* 201.) but certainly about the time of *H.* 7. when long leases began to obtain,—the remedy by ejectment was extended, and rendered more efficacious by the object of the action being completely changed, and the term itself recovered. This was effected by the Courts of Law resolving to give judgment in ejectment that the lessee in ejectment should recover possession of the land itself by the process of a writ called an *habere facias possessionem*.

Ibid.

From this period, the practice in ejectment became wholly subject to the controul of the Court, and a new method of trial, unknown to the common law, was introduced.

Antient Practice. *Ibid.*

It now became usual for a man that had a right of entry into any lands, to enter thereon and seal leases, and then the person that next came on the freehold *animo possidendi*, was accounted an ejector of the lessee; by which means any man might be turned out of possession, because the lessee in ejectment would recover his term without any notice to the tenant in possession; so that the Courts of Law made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a feigned ejector, without

without delivering to the tenant in poſſeſſion a declaration, and making him an ejector and proper defendant if he choſe it.—This rule of Court became abſolutely neceſſary upon the alteration of the object of the action of ejectment, which was now *in rem*; for otherwiſe the Court might have been inſtrumental in doing an injury to a third perſon, becauſe a declaration might otherwiſe be delivered to a ſtranger, a feigned defence be made, and a verdict, judgment, and execution thereon obtained, whereby the tenant would have been ouſted, without notice of any proceedings againſt him. —Upon this notice to the tenant in poſſeſſion, and affidavit thereof made, it was uſual for the tenant in poſſeſſion to move the Court, that, as the title of the land belonged to him, he might defend the ſuit in the caſual ejector's name, which the Court, upon affidavit of that matter, uſed to grant; and that the ſuit ſhould be carried on in the caſual ejector's name, the tenant in poſſeſſion ſaving him harmleſs; and then the caſual ejector was not permitted to releaſe errors in prejudice of the tenant in poſſeſſion, as the ſuit was carried on in his name by rule of Court; and the proceſs for coſts was taken out againſt the caſual ejector, who was obliged to reſort to the tenant in poſſeſſion to recover back the ſame, and put his bond of indemnification in ſuit upon his refuſal to pay them. *Ibid.* 163.

Such leaſes were to be actually ſealed and delivered, otherwiſe the plaintiff could maintain no title to the term; they were alſo obliged to be ſealed on the land itſelf, otherwiſe it amounted to maintenance by the old law to convey a title to any one, when the grantor himſelf was not in poſſeſſion. *Ibid.*

Such was the original method of proceeding in ejectment when the term was firſt began to be recovered; but one alteration by degrees begat another, and fiction was heaped upon fiction. During the exile of King *Charles* the Second, an entirely new mode of proceeding was invented and introduced by Lord C. J. *Rolle*, which method has been followed ever ſince by the Courts, and is therefore called the modern practice, in contradiſtinction from the ancient one juſt deſcribed. *Ibid.*

Modern Practice. 2 Sell. Pract. 164. The new method of proceeding in ejectment depends entirely upon a ſtring of legal fictions; neither actual leaſe, nor actual entry, is made by the plaintiff, nor actual ouſter by the defendant, but all are merely ideal, for the ſole purpoſe of trying the title. To this end, in the proceedings, a leaſe for a term of years is ſtated to have been made by him who claims title, to the plaintiff, who is generally an ideal, fictitious perſon, who has no exiſtence. In this proceeding, which is the declaration, (for there is no other proceſs in this action,) it is alſo ſtated, that the leſſee, in conſequence of the demiſe to him made, entered into the premiſſes, and that the defendant, who is alſo now another ideal, fictitious perſon, and who is called the caſual ejector, afterwards entered thereon and ouſted the plaintiff, for which ouſter the plaintiff brings the action. Under this declaration is written a notice, ſuppoſed to be written by the caſual ejector, directed to the tenant in poſſeſſion of the premiſſes, in which notice the caſual ejector informs the tenant of the action brought by the leſſee, and aſſures him, that as he the caſual ejector has no title at all to the premiſſes, he ſhall make no defence, and therefore he adviſes the tenant to appear in Court at a certain time and defend his own title, otherwiſe he, the caſual ejector, will ſuffer judgment to be had againſt him, by which the actual tenant will inevitably be turned out of poſſeſſion.

Ibid. The declaration is then ſerved on the tenant in poſſeſſion, with this friendly caution annexed to it, who has thus an opportunity to defend his title, which if he omits to do in a limited time, he is ſuppoſed to have no right at all, and upon judgment being had againſt the caſual ejector, the real tenant will be turned out of poſſeſſion by the ſheriff.

Ibid. But if the tenant applies to be made defendant, it is allowed him upon this condition, That he enter into a rule of Court to confeſs at the trial of the cauſe three of the four requiſites to maintain the plaintiff's action, *viz.* the leaſe of the leſſor, the entry of the plaintiff, and the ouſter by the tenant himſelf, who is now made defendant inſtead of the caſual ejector; which requiſites, as they are wholly fictitious, ſhould the defendant put the plaintiff to prove, he muſt of courſe

courſe be nonſuited at the trial for want of evidence; but by ſuch ſtipulated confeſſions the trial will ſtand ſolely upon the merits of the title.

Upon this rule being entered into, the declaration is now altered by inſerting the name of the tenant inſtead of the fictitious name of the caſual ejector; and the cauſe goes to trial under the name of the fictitious leſſee on the demiſe of *A. B.* (the leſſor or perſon claiming title,) againſt *C. D.* (the now defendant,) and therein the leſſor is bound to make out his title to the premiſſes, otherwiſe his nominal leſſee cannot obtain judgment to have poſſeſſion of the land for the term ſuppoſed to be granted. But if he makes out his title in a ſatisfactory manner, the judgment is given for the nominal plaintiff, and a writ of poſſeſſion goes in his name to the ſheriff to deliver poſſeſſion. But if the now defendant fails to appear at the trial, and to confeſs leaſe, entry, and ouſter, the nominal plaintiff muſt then indeed be nonſuited for want of proving theſe requiſites, but judgment will nevertheleſs, in the end, be entered for him againſt the caſual ejector; for the condition on which the tenant was admitted defendant is broken, and therefore the plaintiff is put again in the ſame ſituation as if he had never appeared at all. The ſame proceſs, therefore, as would have been had, provided no conditional rule had been made, muſt now be purſued as ſoon as it is broken; but execution will be ſtayed, if any landlord, after the default of his tenant, applies to be made a defendant, and enters into the uſual rule to confeſs leaſe, entry, and ouſter. *Ibid.* 165.

Thus the practice of ſealing leaſes upon the premiſſes, (except in the caſe of vacant poſſeſſion) and making an actual entry and ouſter, (unleſs to avoid a fine) are now diſpenſed with, and a more eaſy and expeditious method is adopted, while the ſame ſubſtantial juſtice is done to the tenant in poſſeſſion, by proper notice being given him of the ſervice of the declaration; nor is there any hardſhip in compelling him to confeſs leaſe, entry, and ouſter, for they are mere formalities, and have nothing to do with the merits of the caſe.—The great advantage, indeed, which has reſulted from this fictitious mode is, that being wholly regulated by the Court, it has, from to time, been ſo mo- *Ibid.*

delled, as to anſwer in the beſt manner every end of juſtice and convenience.

Run. Eject. 1. An ejectment, therefore, may be defined a mixed action, by which a leſſee for years, when ouſted of his term, may recover poſſeſſion, and damages, and coſts. It is real in reſpect of the lands, but perſonal in reſpect of the damages and coſts.

Who may have this Action.

Poſſeſſion gives the perſon enjoying it a right againſt every man who cannot ſhew a better title; the party therefore who would change the poſſeſſion, muſt firſt eſtabliſh a legal title to it.

Ibid. 15. 3 Bl. Com. 206. 2 Eſp. N. P. 430. In order to eſtabliſh ſuch legal title, the party muſt have a right of entry, or he cannot bring the ejectment; for it will not lie in ſuch caſes, where the entry of him that hath right is taken away by deſcent, diſcontinuance, twenty years poſſeſſion, or otherwiſe: and on thoſe things whereon an entry cannot in fact be made, no entry ſhall be ſuppoſed by the fiction of the parties.

Ibid. 431. Therefore, where the aſſignee of a bankrupt brought an ejectment for part of the bankrupt's eſtate before the enrollment of the bankrupt's eſtate made to him by the commiſſioners, he was nonſuited; for the aſſignment is by bargain and ſale, which, under ſtat. 27 *H.* 8. *c.* 16. is ordered to be enrolled within ſix months: and it is enacted by the ſtat. 13 *Eliz. c.* 7. and 21 *J.* 1. *c.* 19. that all the bankrupt's lands, tenements, *&c.* ſhall be ſold by deed indented and enrolled; ſo that before enrollment, the aſſignees have no legal title.

Ibid. But in the caſe of a common bargain and ſale, it is otherwiſe; for there the eſtate paſſes by the contract and is executed by the ſtatute of Uſes: whereas the commiſſioners of bankrupt have a power expreſsly regulated by ſtatute.

So, where tenant in tail works a diſcontinuance, as by a feoffment in fee and dies, the iſſue in-tail cannot maintain this action, for they cannot enter. Such alſo is the caſe as to other deſcents which toll entries.

The ſtat. 32 *H.* 8. *c.* 28 alters the common law, by giving a right of entry to the wife or her heirs, after the death of the huſband,

huſband, who had aliened lands and tenements of the inheritance of the wife: ſo that ſhe or her heirs may now ſupport this action.

So, by ſtat. 11 *H.* 7. *c.* 20. it is enacted, That if any woman having an eſtate in dower, or for life, or in tail, jointly with her huſband, or ſolely to her own uſe, but coming from him, ſhall alien, diſcontinue, *&c.* or ſuffer a recovery, ſuch ſhall be void; and the huſband's heir, or he who is entitled to the lands after her death may enter, and ſo may maintain this action.—Under this ſtatute to enable the huſ- Cro. Eliz. 4.
band's heir to enter upon the lands of the gift of the huſband and aliened by the wife againſt the ſtatute, the remainder muſt have been limited to the heirs of the huſband, not to a ſtranger; for the ſtatute was intended for the benefit of the huſband and his heirs.

Though a good and lawful title may ſubſiſt in the plaintiff, yet he may be barred of his right of entry, and therefore of his power to recover in this action, under the ſtatu 21 *J.* 1. *c.* 16. which enacts, That no perſon ſhall make an entry into lands, *&c.* but within twenty years after his right and title ſhall firſt accrue, with the uſual ſavings for infants, feme coverts, and perſons inſane, *&c.*

Therefore, if the leſſor of the plaintiff is not able to prove himſelf or his anceſtors to have been in poſſeſſion within twenty years before the action brought, he ſhall be nonſuited.

This poſſeſſion muſt be an actual poſſeſſion, not an implied or preſumptive poſſeſſion merely.

Therefore, in ejectment for mines, the poſſeſſion of the 2 Str. 1142.
manor is no evidence to avoid the ſtatute; there being no entry within twenty years upon the mines, which are a diſtinct poſſeſſion, and may be a different inheritance.

So alſo, a verdict in trover for lead dug out of the mine Bull. N. P. 102.
is no evidence; for trover may be brought on property *ſ. c.*
without poſſeſſion.

So, the poſſeſſion of a manor is not the poſſeſſion of a *Ibid.* 103.
cottage built thereon, for if it were, the lord would have a better title to that than to any other part of his eſtate.

Receipt for rent by a ſtranger is no evidence of poſſeſ- *Ibid.* 104.

ſion, ſo as to take it out of him in whom the right is, for it is no deſſeiſin without the admiſſion of him who right has; not even though he made a leaſe to the tenant by indenture reſerving rent, unleſs he make an actual entry. So, though the tenant declare that he is in poſſeſſion for the ſtranger; though it may be proper to be left to a jury, eſpecially if the ſtranger have any colour of title.

Ibid. 102. If a declaration in ejectment has been delivered within twenty years, and a trial had, whereby leaſe, entry and ouſter has been confeſſed, if the plaintiff has been non-ſuited in that action, and brings another ejectment after the twenty years expired, the former confeſſion of leaſe, entry and ouſter ſhall not be ſufficient to ſave the running of the ſtatute againſt the plaintiff; for there muſt be an actual entry within twenty years. But

Eſp. N. P. 432. Poſſeſſion for twenty years without interruption ſhall be a good title in itſelf, to enable the party to recover in ejectment, without any other title: for an uninterrupted poſſeſſion for twenty years is like a deſcent which tolls an entry, and gives a poſſeſſory right that is ſufficient to ſupport this action. So, that though the defendant be the perſon who has lawful right to the premiſſes, yet he cannot juſtify ejecting the plaintiff who has had twenty years previous peaceable poſſeſſion.

The twenty years poſſeſſion in order to give a title and ſo bar an ejectment, muſt be an adverſe poſſeſſion; for where it appears not to be adverſe, the ſtatute of limitations does not run.

Ld. Raym. 740. Therefore where a man made a mortgage as a collateral ſecurity, the intereſt having been paid for twenty years and more, the mortgagee was held not to be barred in bringing his ejectment, though the mortgagor had continued for that time in poſſeſſion; for their titles being the ſame, there was no adverſe poſſeſſion.

Salk. 285. So alſo in ejectments by joint tenants, the poſſeſſion of one joint-tenant or coparcener is the poſſeſſion of the other, ſo as to prevent the ſtatute of limitations from running againſt the title of either: and if one joint-tenant levy a fine, though it ſever the jointure, it does not amount to an ouſter of his companion.

So

So, with reſpect to tenants in common, if one of them bring an ejectment againſt the other, there muſt be an actual ouſter and adverſe poſſeſſion proved, in order to bar the defendant, for though one tenant in common may diſſeiſe another, it muſt be done by actual diſſeiſin, and not by bare perception of the profits only; for generally ſpeaking, the poſſeſſion of the one is held to be the poſſeſſion of the other. Co. Lit. 195. b. 2 Salk. 423. 2 Eſp. N.P. 434.

Alſo, where two are in poſſeſſion the law will adjudge it in him that hath the right: for the ſtatute never runs againſt a man but where he is actually ouſted or diſſeiſed.

Where a right of entry is given in three months after notice of premiſſes being out of repair, acceptance of rent, after three months expired, does not prevent plaintiff from maintaining ejectment; particularly if the premiſſes are not repaired at the time of the action being brought. 1 Eſp. R. 393.

What ſhall be deemed an actual ouſter, ſo as to conſtitute an adverſe poſſeſſion in one tenant in common againſt another, is matter for the conſideration of the jury.

Thus, thirty-ſix years ſole and uninterrupted poſſeſſion by one tenant in common, without any account to, demand made, or claim ſet up by his companion, was held to be ſufficient ground for the jury to preſume an actual ouſter of the co-tenant, and they did ſo preſume. Cowp. 217.

So, if upon demand by the co-tenant of his moiety, the other refuſes to pay and denies his title, ſaying he claims the whole and will not pay, and continues in poſſeſſion, ſuch poſſeſſion is adverſe and ouſter enough. *Ibid.* 218.

In ejectments by tenants in common, an entry by one ſhall be good for all, for he ſhall be ſuppoſed to enter according to his eſtate.—A man cannot be diſſeiſed of an undivided moiety; and if a man be ſeiſed of the whole, and makes a leaſe to another of a moiety undivided and a ſtranger ouſts the leſſee, he muſt bring his ejectment of a moiety, and ſo if they be both ouſted, they muſt bring ſeveral ejectments. Hob. 120. Eſp. N. P. 434. Salk. 285.

For, where two perſons claim by the ſame title, there ſhall not in general be an adverſe poſſeſſion preſumed, ſo as to toll an entry of the one, but the entry of the other being deemed always lawful, ſhall preſerve the unity of title. Co. Lit. 242. Eſp. N. P. 434.

Thus

Bull. N. P. 402. Thus, where the defendant made title under the ſiſter of the leſſor of the plaintiff, and proved that ſhe had enjoyed the eſtate above twenty years, and that he had entered as heir to her, the Court did not regard it, becauſe her poſſeſſion was conſtrued to be by curteſy, and not to make a diſheriſon, but by licence to preſerve the poſſeſſion of the brother, and therefore was held not to be within the intent of the ſtatute. But had the brother ever been in actual poſſeſſion and ouſted by his ſiſter, it would have been otherwiſe, for then her entry could not poſſibly be conſtrued to be to preſerve his poſſeſſion.

So, where one claims under or through the other, there ſhall be no adverſe poſſeſſion.

Ibid. 404. Therefore, though if a cottage be built in defiance of the lord of a manor, and quiet poſſeſſion of it has been had for twenty years, it ſeems it is within the ſtatute, and the lord ſhall not recover; yet if it were built at firſt by the lord's permiſſion, or any acknowledgment had been ſince made, (though it were a hundred years ſince) the ſtatute will not run againſt the lord; for the poſſeſſion of a tenant at will for ever ſo many years is no diſſeiſin; there muſt be a tortious ouſter.

1 T. R. 761. *in n.* A leſſor of a plaintiff may recover in an ejectment a reverſionary intereſt ſubject to a leaſe and a right of preſent poſſeſſion in another.

2 Co. 61. Eſp. N. P. 449. Huſband and wife may join in a leaſe, without ſaying that it was by deed, though formerly held to be neceſſary.

Ibid. 435. A mortgagee may maintain an ejectment in order to obtain poſſeſſion of the mortgaged premiſſes or eſtate.—But a diſtinction is to be obſerved where the ejectment is againſt the tenant holding under a leaſe prior to the mortgage; and where againſt the mortgagor himſelf, or againſt a tenant in poſſeſſion under a leaſe or demiſe made ſubſequent to the mortgage.

Doug. 282. *Ibid.* 23. *in n.* For where lands are let for years and afterwards mortgaged, the tenant's poſſeſſion is protected, and he cannot be turned out by the mortgagee. The Courts however now permit the mortgagee to proceed by ejectment againſt ſuch tenant, if he has given notice to him before the action that he does not mean to diſturb his poſſeſſion, but only requires

requires him to pay the rent to him, and not to the mortgagor.

But a mortgagee may recover in this action against a tenant who claims under a leaſe from the mortgagor granted after the mortgage, without the privity of the mortgagee, without giving ſuch notice; for the mortgagor has no power, expreſs or implied, to let leaſes not ſubject to every circumſtance of the mortgage, and therefore ſuch leſſee is a treſpaſſer, diſſeiſor, and wrong-doer, and may be turned out by the mortgagee without notice to quit. *Ibid.* 22, 24.

So, if the mortgagee aſſign the mortgage, and the aſſignee aſſigns to another, this laſt aſſignee may maintain this action for the mortgaged premiſſes. Salk. 245.

A ſecond mortgagee who takes an aſſignment of a term to attend the inheritance, and has all the title deeds, and had no notice of the firſt mortgage, may recover in ejectment againſt the firſt mortgagee. 1 T. R. 755.

The deviſee of a term of years may maintain ejectment to recover the term demiſed; but he muſt ſhew the aſſent of the executor; which will be ſufficiently done by proof of the executor having paid a certain ſum, where the term was deviſed to him for life, he paying to a particular party ſuch ſum. 1 Str. 70.

But, in the caſe of the deviſe of a freehold, the deviſee may immediately and without any poſſeſſion, maintain an ejectment for the lands deviſed; for after the teſtator's deceaſe, the law caſts the freehold on the deviſee: and even ſhould the heir enter and die ſeiſed, and a deſcent be caſt, yet, it is ſaid, the deviſee may enter (unleſs he be barred by a fine levied by the heir and five years non-claim) and maintain an ejectment. Co. Lit. 240. *b.*

Tenant by *elegit* may maintain this action in order to be put into poſſeſſion under the *elegit*, of the lands returned by the inquiſition before the ſheriff. Doug. 493. Bull. N. P. 104.

The conuſee of a ſtatute-merchant alſo may bring this action.

The aſſignees of a bankrupt may maintain an ejectment for a term of years or lands which belonged to the bankrupt: for by the aſſignment, all the bankrupt's property, real and perſonal, is veſted in the aſſignees, under ſtat. 13

Eliz. 7. *s.* 2. and therefore they must be invested with all the power necessary to get into possession.

1 Atk. 252. But the assignment only operates on lands in the bankrupt's possession at the time of the assignment made; for as to future real estates, there must be a new bargain and sale.

A sale by the commissioners of lands of which the bankrupt is seised in tail, by deed inrolled, shall have the same effect to bar the intail as if a recovery had been suffered of them by stat. 21 *J.* 1. *c.* 19. *s.* 12.

1 Saund. 112. 1 Lev. 170. If a rent-charge be granted to any one, with a proviso that if the rent be in arrear that it shall be lawful for the grantee, his heirs and assigns, to enter and hold the lands out of which the rent-charge is granted till he shall be satisfied out of the arrears: this shall give to the grantee such an interest that he may make a lease of the land by which he may maintain his ejectment.

Mob. 215. Hutt. 16. 2 Wils. 130. The committee of a lunatic may bring an ejectment; but it must be in the name of the lunatic; for the committee is but as bailiff, and cannot make leases of the land.

2 Str. 694. An infant may maintain this action; but he must name good plaintiff who may be answerable for the costs.

Esp. N. P. 439. Executors may maintain ejectment for land let to their testator for years, if the testator is ousted; for by stat. 4 *E.* *c.* 6. an action is given to executors for goods taken out of their testator's possession, and the act extends to this case, because the term itself is recovered.—So, if the executors themselves of the lessee for years are ousted, they may have either a special writ on the case, or an action of ejectment.

3 T. R. 13. The administrator also of a yearly tenant as long as the lessor and lessee pleased, may maintain an ejectment; for the administrator has the same interest in a chattel as the intestate had.—So, if the spiritual court grant administration *pendente lite*, such an administrator may bring this action.

2 Atk. 286.

Co. Lit. 129. An alien cannot maintain ejectment, for he cannot take lands by descent.

As to the issue of aliens, and to children born out of the realm, it is settled by stat. 25 *E.* 3. *s.* 2. that children whose fathers and mothers, at the time of their birth, should be liege subjects of *England*, shall be inheritable to lands within the kingdom, though such children were born out of the kingdom;

dom: and by ſtat. 7 *Ann.* 5. and 4 *G.* 2. *c.* 4. all children born out of the ligeance of the crown of *Great Britain*, whoſe fathers are natural-born ſubjects, ſhall be deemed natural-born ſubjects and ſo may inherit lands.

When a corporation aggregate is leſſor of the plaintiff, it is ſaid, they muſt give a letter of attorney to ſome perſon to enter and ſeal a leaſe upon the land, and therefore the plaintiff ought in ſuch caſe to declare upon a demiſe by deed, (for they cannot enter and demiſe upon the land as natural perſons can) though this will be aided after verdict: however, this ſeems to be unneceſſary now; for this being a fictitious action, the demiſe need not now be ſet out to be by deed. Bull. N. P. 98. 1 Ld Raym. 136. Run. Eject. 149.

So, a corporation ſole may bring ejectment: as a biſhop againſt the copyholders of a manor belonging to the biſhopric, for a forfeiture committed while the ſee was vacant; and the lord of a manor may bring this action in the like caſe. Bull. N. P. 107. Eſp. N. P. 440.

So, a copyholder, if ejected by his lord, may maintain ejectment againſt him; for though he is called a tenant at will, yet it is according to the cuſtom of the manor, and he cannot be put out while he performs his ſervices.—But in ſuch caſes it ſeems to be neceſſary that he ſhould be empowered either by the cuſtom of the manor or the licence of the lord, to make a leaſe: and even without ſuch a power the copyholder can maintain ejectment againſt all perſons but the lord. *Ibid.* Cro. Eliz. 535. *Ibid* 676.

So, a widow entitled to her free-bench may maintain this action before admittance; for it comes out of the eſtate of the huſband. Hutt. 18.

But in the caſe of a ſurrender, no complete title veſts in the ſurrenderee till admittance, for till then it remains in the ſurrenderer: and if he dies, it is ſo much in him that his heir may maintain ejectment. Yelv. 144. Bull. N. P. 108.

If, however, a ſurrender be made, the admittance ſhall relate to that time, ſo that the ſurrenderee may recover on a demiſe laid between the time of ſurrender and admittance. 1 T. R. 600.

For what this Action will lie.

An ejectment will lie for nothing of which the ſheriff cannot deliver poſſeſſion under an execution: therefore it Bull. N. P. 93.

will

will not lie for incorporeal hereditaments, as a rent, common *par cauſe de vicinage*, which is a mere permiſſion, or other thing lying in grant, *quæ neque tangi, nec videri poſſunt.*

Ibid. But it will lie for common appendant or appurtenant, for the ſheriff by giving poſſeſſion of the land gives poſſeſſion of the common.

The ſtat. 32 *H.* 8. *c.* 57. enacts, That where any perſon ſhall have an eſtate of inheritance in tithes or other ſpiritual profits which ſhall be in lay lands, he may maintain an Eſp. N. P. 428. ejectment or other action for them.—This action is now allowed where the tithes are in the hands of the clergy.

1 Bur. 143. An ejectment will lie by the owner of the ſoil for land ſubject to a paſſage over it, as the king's highway: for the king has nothing but the paſſage for himſelf and his people, but the freehold and all profits belong to the owner of the ſoil, ſo do all trees upon it, and mines under it; therefore the owner may carry water-pipes under it.

Ibid. But it ſhall be recovered ſubject to the eaſement; which the owner may get diſcharged by a writ *ad quod damnum.*

Eſp. N. P. 428. An ejectment for a water-courſe or ſtream of water is ill, for poſſeſſion of it cannot be delivered: it ſhould be of ſo much "land covered with water."

Ibid. So, an ejectment for a manor, generally, is bad, without expreſſing the number of acres for ſervices belonging to a manor.

Ibid. Salk. 256. An ejectment will lie for a church; but it muſt be demanded by the name of a meſſuage. In this caſe, it was ſaid, that the curate may have a rule to defend *quoad* a right of entry to perform divine ſervice; but that caſe has been over-ruled.

3 Lev. 96. So, an ejectment for "a certain place called the veſtry "in *D.*" was held well enough.

Cro. Eliz. 854. Cro. Jac. 654. This action lies for an orchard; which may be demanded in the *præcipe* either by that name, or by the name of a garden.

Run. Eject. 122. So, it lies for a ſtable, and a cottage.

Ibid. Salk. 254. Cro. Jac. 435. 654. It ſeems to be the better opinion, that an ejectment will not lie for a cloſe, and that giving it a particular name will not make it ſufficiently certain for the ſheriff to be able to deliver it: So it will not lie for "a piece of land."

Nor

Nor for the third part of a close, or fourth part of a meadow, without setting forth the particular contents or number of acres; and such number should be stated with certainty, and not by estimation; also the nature of the land, as whether meadow, pasture, arable, *&c.* should be mentioned. Run. Eject. 123.

But for a close called *D.* containing three acres of land, was held well enough; for "land" signifies arable land; therefore both quantity and quality were specified. The cases, however, on this point are contradictory. *Ibid.* Cro. Jac. 435.

Ejectment for "a messuage *or* tenement" is too uncertain; the word "tenement" being of more extensive signification than the word "messuage;" consequently it is uncertain what is demanded by the ejectment. For the same reason, it has been held that it will not lie for a tenement only. Run. Eject. 124. Cro. Eliz. 186. 1 East's R. 441.

Therefore, in ejectment, the plaintiff declared of "one "messuage or tenement," and had a verdict: whereupon it was moved in arrest of judgment, because an ejectment will not lie of a tenement; and "messuage *or* tenement" is so uncertain that the sheriff cannot tell of what he shall give possession; for a tenement may be of an advowson, a house, or land of any kind. 3 Wils. 23.

Wilmot C. J.—To be sure there are many old cases, where judgments in ejectment have been arrested for this supposed uncertainty; but I do not recollect any very modern case: There was a late case in B. R. where the declaration was of a messuage *and* tenements, and that Court gave leave to strike out the words "and tenements," and to proceed for the messuage. I think a "messuage or tenement," in common parlance, means a messuage; and at this time of day, no mortal imagines that a tenement means any thing but a dwelling-house, for by long use it has acquired that definite signification.—*Hesitante Curiâ*, a rule was made to shew cause why judgment should not be arrested.

This matter came on again, and was debated by counsel on both sides: when the Court seemed inclined to get over this objection if possible, and took further time to consider, until the last day of the term: [*Note.* It was first before the Court on the second day of Term,] but at last they thought them-

themſelves bound by the caſes cited, and (againſt their inclination) arreſted the judgment.

Run. Eject. 124. But it is queſtionable, whether the reaſon on which the objection was founded, ought at preſent to prevail; inaſmuch as the ſheriff now delivers poſſeſſion of the premiſſes recovered, according to the direction of the plaintiff himſelf.

1 T. R. 11. An ejectment for a meſſuage *and* tenement has been held good, after verdict.

2 Ld. Raym. 191. Cowp. 350. Run. Eject. 125. So, a meſſuage or tenement, with other words expreſſing its meaning, is good; as "a meſſuage or tenement called "the *Black Swan*;" for the addition reduces it to the certainty of a dwelling-houſe.

Ibid. So, for a meſſuage or burgage in *H.* is good; becauſe they ſignify the ſame thing in a borough.—So, for a meſſuage or dwelling-houſe; for they are ſynonimous terms.

Ibid. 122. Cro. Jac. 654. So, ejectment for a houſe is good; but it is ſaid that in the *præcipe* it ought to be demanded by the name of "a meſſuage."

2 Str. 695. Run. Ject. 122. So, ejectment lies for part of a houſe; as of a chamber in a houſe; or of one room in a houſe.

Ibid. But an ejectment of a kitchen has been determined to be bad; for though the word be well underſtood in common parlance, yet becauſe any chamber in a houſe may be applied to that uſe, the ſheriff hath not certainty enough to direct him in the execution; and the kitchen may be changed between judgment and execution.

Ibid. 126. The courts have long diſcontinued the rules which govern the *præcipe*, and allow many things to be recovered in this action, which cannot be demanded in that writ. Indeed it has repeatedly been determined that ſuch preciſe certainty is not requiſite in ejectment, as in a *præcipe quod reddat*; in which it is neceſſary to deſcribe the lands demanded once, at leaſt, with certainty and preciſion, that the defendant may know what he is to defend. Even in that proceeding, whenever the term uſed, either in reſpect to quantity or quality, was ſufficiently certain and notorious to anſwer that purpoſe, it was good, though not particularly named in the Regiſter.—Of late years many things have been improved by art, which having required new appellations

appellations, are now not only perfectly underſtood by the law, but familiar to common underſtanding, though not to be found in antient law-books. Words and names are arbitrary: and as men contracted by ſuch new appellations, it was but reaſonable to permit the remedy to follow the nature of the contract. Indeed, whilſt ejectments were compared to real actions, and arguments were drawn by analogy from them, they were of courſe fettered: and this was very much the caſe, till after the reign of *James* the Firſt. But of later times, an ejectment has been conſidered with more latitude and greater liberality, as a fictitious action to try titles with more eaſe and diſpatch, and with leſs expence to the parties.

Even formerly an ejectment would lie for a hop-yard.— *Ibid.* So, for alder-carr, a provincial term well known in *Norfolk*, where it ſignifies land covered with alders.—In *Yorkſhire*, it is common to bring this action for cattle-gates, agreeable to which, it has been held, that an ejectment will lie for a beaſt-gate; a term uſed in *Suffolk* to denote land and common for one beaſt. A cattle-gate is a diſtinct thing from a right of common; it paſſes by leaſe and releaſe; cannot be deviſed but according to the ſtatute of Frauds; and has been decided to be a tenement, within ſtat. 13 & 14 *C.* 2. *c.* 12. for the purpoſe of gaining a ſettlement.

Where an ejectment was brought for a croft and an acre of meadow, the plaintiff had a verdict, and a ſpecial judgment for his acre of meadow, releaſing the coſts and damages for all; for he was allowed his coſts, becauſe by the judgment he had a juſt cauſe of ſuit againſt the defendant.

So, this action will lie for fifty acres of furze and heath, and fifty acres of moor and marſh. 5 Bur. 2672.

It lies, alſo, for ſo many acres of bog in *Ireland*, where that word has but one ſignification and comprehends only one ſort of land.—So, it will lie for mountain in *Ireland*, becauſe there the word mountain is rather a deſcription of quality than the ſituation of the land.—So, for "a quarter "of land," in *Ireland*; for it may be a term as well known there as mountain is: and that the Courts here will intend. Run. Eject 128.

An ejectment may be brought for ten acres of wood and ten of underwood; for they are of different natures; and *Ibid.* 129.

even if otherwiſe *bis petitum* is no objection in an ejectment.

Ibid. 131. Whether it will lie for a fiſhery ſeems rather doubtful; the old caſes are againſt it; but the more modern opinion inclines to ſupport the action.

But it lies for a boilary of ſalt; for that is not, like a piſcary, tranſient and running, but the water is fixed within a certain ſpace and may be taken to be part of the ſoil; and by the grant generally of a boilary of ſalt the ſoil itſelf paſſes.

This action lies for the firſt crop; for the firſt graſs, *primâ tonſurâ*, is the beſt profit of the property, wherefore he who has it is eſteemed the proprietor of the land itſelf, till the contrary be proved.

So, an ejectment lies for herbage; herbage being the moſt ſignal profit of the ſoil, and the grantee having at all times a right to enter and take it.

2 T. R. 452. So, it ſhould ſeem, this action would lie for the hay-graſs and after-math of a meadow; for the ſame reaſon.

Run. Eject. 133. So, it will lie for a ſheep-walk; as *pro paſturâ centum ovium*, that is, as much land as will feed one hundred ſheep.

Ibid. But it will not lie for pannage; that not being the immediate produce of the ſoil itſelf, but merely the maſts that fall from the trees, on which the ſwine feed.

An ejectment lay at common law for a rectory, which, conſiſting of a church, glebe lands, and tithes, has been ſaid to reſemble a manor; the church being compared to the manſion-houſe, the glebe lands to the demeſnes, and the tithes to the ſervices.

Chapels having become lay inheritances, are recoverable in ejectment like other lay eſtates; it ſhould however be demanded by the name of a meſſuage.

Ejectment will not lie for encroachments on the waſte, made by the tenant.

1 Eſp. R. 460, 461. Thus, in ejectment for the recovery of a garden which the tenant had gained during his tenancy, by encroachment, Lord *Kenyon* revolted at the idea that the tenant could make his landlord a treſpaſſer, which would unavoidably be the caſe if the landlord could recover in this ejectment. His Lordſhip laid it down as clear law, that if a tenant

a tenant incloſe part of a waſte, and is in poſſeſſion thereof ſo long as to acquire a poſſeſſory right to it, ſuch incloſure does not belong to the landlord; but if the tenant has acknowledged that he held ſuch incloſed part of his landlord, that would make a difference: and he refuſed to ſave the point.

On a leaſe of ground to build on, if the building correſponds with the abuttals, though they do not with the meaſured diſtance, as ſet out in the leaſe, if the leſſor has ſeen the progreſs of the building without objection made, he ſhall not be allowed to claim the part incloſed upon, but his acquieſcence ſhall be preſumed. *Ibid.* 249.

Of the Action of Ejectment, where the Tenant is in Poſſeſſion.

As the old mode of proceeding muſt be adhered to in very few caſes, we have noticed thoſe caſes under a ſeparate head; conceiving that plan to be more perſpicuous, than introducing them incidentally in treating of that part of the ſubject which regards the modern method of carrying on the action.

Having, therefore, conciſely ſtated the general principles and practice of this action, and enumerated the caſes in which, and the things for what, it lies, we proceed more particularly to conſider the preſent practice in common, and indeed with the exceptions mentioned, in all caſes.

The caſes that more immediately apply to the ſubject of this work, are thoſe in which a landlord is compelled to have recourſe to this remedy in conſequence of

1ſt, His tenant holding over without his permiſſion and againſt his conſent after the term has expired by effluxion of time; for a man may come in by a rightful poſſeſſion and yet hold over adverſely without a title, and if he does, ſuch holding over, under circumſtances, will be equivalent to an actual ouſter. Cowp. 218.

2ndly, His tenant determining the leaſe by non-payment of rent, or non-performance of covenants, where a right of re-entry and forfeiture are conditioned on the breach of them.

In theſe caſes the modern method of proceeding prevails, *vide ante*. p. 340.

for the nature of which we refer the reader to the introductory part of this title.

2 Sell. Pract. 168. The proceedings in the court of King's-Bench may be either by bill or original, but the latter mode is preferable, as no writ of error can be brought thereon except in Parliament.—In the Common-Pleas they are always by original.

Ibid. The declaration and notice are the firſt proceſs, no writ being ſued out.

6 Mod. 222. Cowp. 176. Ejectment being a local action, the venue muſt be laid in the county in which the premiſſes are ſituate. Proceedings being *in rem*, the effect of the judgment cannot be had, if the venue be laid in a wrong place. Poſſeſſion is to be delivered by the ſheriff of the county, and as trials in England are in particular counties, the officers are county officers; the judgment therefore could not operate, if the action was not laid in the proper county.

Eſp. N. P. 444. Run. Eject. 214. 1 Bur. 199. As the plaintiff muſt recover by the ſtrength of his own title, he muſt ſhew a good and ſubſiſting one at the time of the ejectment brought, and therefore though the plaintiff by the new method of proceeding is not obliged to make an actual entry, or a real leaſe, yet he muſt lay the commencement of the ſuppoſed leaſe in his declaration preceding the ouſter and ejectment of the defendant; becauſe the wrong complained of by the plaintiff is, that the defendant entered upon his poſſeſſion, which he hath title to by virtue of the demiſe mentioned in the declaration; therefore if the ejectment and ouſter ſhould be laid before the commencement of the leaſe, though ſuch ouſter be wrong; yet the plaintiff ought not to complain of it, for it was no wrong to him, inaſmuch as by his own ſhewing it was done before his title commenced.

Eſp. N. P. 444. 2 Sid. 7. Where a demiſe was laid on the 24th of *June*, to hold from the ſaid 24th of *June*, by virtue of which on the day and year laſt-mentioned he (the plaintiff) had entered, and the defendant afterward (to wit) on the 24th of *June*, had evicted him, it was held to be bad, for *from* being excluſive the leaſe did not commence till the 25th of *June*.

Run. Eject. 215. The word "from" however has ſince received a more liberal

liberal conſtruction, and "from the day of the date" are now held to import either incluſively or excluſively, ſo as to give effect to the deed, and to ſupport the intention of the parties. *ante* p. 132.

But where poſſeſſion had been demanded on the 5th of *October* of the defendant, who had been tenant at will to the leſſor of the plaintiff, and an ejectment was brought, and the demiſe was laid on the 1ſt of *October*, it was adjudged that the plaintiff could not recover, the tenancy not having been determined until after the day of the demiſe in the declaration. 4 T. R. 681.

In ejectment on the demiſe of an heir by deſcent, the demiſe was laid on the day the anceſtor died, and held well enough after verdict; for as to the fraction of a day, a fiction of law may heal, but ſhall not hurt. 3 Wilſ. 274.

So, where the ejectment was brought by a poſthumous ſon, and the demiſe laid from the time of his father's death, Lord *Hardwicke* inclined to think that it was good, and that the defendant would be eſtopped to ſay he was not born at the time of the demiſe laid, by ſtat. 10 & 11 *W.* 3. *c.* 16. Bull. N. P. 105.

But it is not neceſſary to lay any day certain upon which the plaintiff entered; it is ſufficient to lay a demiſe after the title accrues, and then ſay in general "that he afterwards entered," *&c.* for ſo are the precedents. Eſp. N. P. 445.

The declaration ſhould ſtate the ejectment by the defendant to have been done ſubſequent to the date of the ſuppoſed leaſe made to him by the leſſor of the plaintiff; for otherwiſe the ejectment, which is the injury complained of, would precede the time at which the plaintiff's title accrued, ſo that there could be no cauſe of action.

But though ſuch be the proper form of declaring, yet this being a fictitious action, it is not fatal if laid otherwiſe; for in caſes that have occurred where the ejectment was laid prior in point of time to the demiſe, yet the Court held it good. Cro. Jac. 96.

Thus, in ejectment the plaintiff declared upon a leaſe dated 1ſt *February* 1742, to hold from the 8th of *January* before, that afterwards, *viz.* 28th *January* 1752, the defendants ejected him.—It was inſiſted for the defendants, that the ejectment was laid to be before the plaintiff's title under the Bull. N. P. 106.

leaſe, which was not made till 1ſt *February*, and 1 *Sid.* 7. was cited; but it was holden, that the day of the ejectment being laid under a *viz.* was ſurpluſage, and that "after-"wards" ſhould relate to the time of making the leaſe, and then all would be well enough, and the plaintiff had a verdict.

Cro. Jac. 311. For the plaintiff need not mention in his declaration any particular day of the ouſter, provided it appears to be ſubſequent to the term commenced, and before the action be brought; though in the precedents a day certain is always laid.

7 T. R. 727. In the caſe of an ejectment to avoid a fine, however, an actual entry is neceſſary; and the plaintiff cannot lay his demiſe, or recover the meſne profits before ſuch entry.

Ante p. 351. The declaration ſhould alſo ſtate, as has been before obſerved, both the quantity and the nature of the land to be recovered.

Salk. 254. In like manner, where the ejectment was for five cloſes of arable and meadow, called ——— containing twenty acres in *D.* upon not guilty pleaded, and verdict for the plaintiff, judgment was arreſted, becauſe it was not ſhewn how much there was of one, and how much of the other.

But the plaintiff need not declare for the exact quantity which he has a right to recover, for he may declare for any indeterminate quantity, and the form now uſed is to *viz.* one thouſand acres of paſture, one thouſand acres of arable, *&c.* for he ſhall recover according to the quantity to which he proves title.

Cro. Eliz. 12. Therefore where the plaintiff declared in ejectment of one hundred acres of land, and ſhewed his leaſe in evidence only for forty acres; and it was ſaid that he had failed of his leaſe, for there was none ſuch as that of which he counted; yet it was ruled to be good for ſo much as was compriſed in the leaſe, and that for the reſidue, the jury might find the defendant not guilty.

3 Lev. 334. So, if the plaintiff proves a title to but a moiety of that for which he declares, he ſhall only recover ſuch half: as where he declared for a houſe, and proof went to ſhew that only part of it was built on the plaintiff's land by encroachment, he recovered ſo much as was built on his land.

But

But though part may be recovered on a demand for the whole, the reverſe will not hold; for if the plaintiff prove more than he has declared for he ſhall not recover it, for he can recover no more than he goes for in his declaration. 1 Bur. 330.

But as to the plaintiff's title, he ſhall recover according to what it really is, though he declare for a longer term than he has a right to recover.

Therefore, where the leaſe declared upon was from the 25th of *March* 1765 for ſeven years, the plaintiff proved that *J. S.* was ſeiſed, and that by indenture in 1763 he demiſed the premiſſes in queſtion to *D.* for ſeven years, to commence at *Midſummer* 1763, and that in 1764 *D.* aſſigned the reſidue of the term then unexpired to *Carruthers*. It was inſiſted for the defendant, that though in ejectment the leaſe is fictitious, yet the plaintiff muſt declare on ſuch a leaſe as ſuits with the title of his leſſor; here if he recover at all, he muſt recover a term which is of two years longer duration than his title. But *per* Lord *Mansfield* there is nothing in the objection, for if the leſſor have a title, though but for a week, he ought to recover; for the true queſtion in ejectment is, who has the poſſeſſory right.—Suppoſe a perſon has an intereſt for three years only, and ſhould make a leaſe for five years, it would be good for the three years. Bedford (Leſſee of Carruther, v. Dendein. Sit. at Middx. after T. T. 5 G. 3. Bull. N. P. 106.

Where the title is in ſeveral perſons, who are ſeverally concerned in intereſt, it is uſual to declare by ſeveral diſtinct counts, upon ſeveral demiſes; therefore when a term is limited to truſtees for ſecuring the payment of an annuity, or portions, *&c.* though the truſtees ſeldom act, yet it is uſual to declare upon their demiſe, and alſo upon the demiſe of the *ceſtui que truſt*. By this means in ſuch and ſimilar caſes, the plaintiff is not confined to one demiſe, but may reſort to any other which he has ſtated, and under which he may be able to prove a title: and where ſeveral demiſes are apparently inconſiſtent, the Court, to aſſiſt the title of the leſſor of the plaintiff would perhaps permit him to enter a *non-pros*, as to all the demiſes but that which he can legally ſuſtain: and after verdict, if by any means the plaintiff can be ſuppoſed to have title, as ſtated in the declaration, the Court will ſupport it. Run. Ejectm. 211. 1 Wilſ. 1. 2 Str. 908. 1180.

If the declaration ſtates the demiſe to the plaintiff to be Eſp. N. P. 448.

of more leſſors than one, it muſt appear that each leſſor had a title to the whole of the land or premiſſes demiſed, or it will be bad; for if one of them has not an intereſt in the whole, he cannot be ſaid to demiſe it.

Ibid. 6 Co. 14. *b.* Therefore, where the plaintiff declared in ejectment on a leaſe made by *A.* and *B.* and on not guilty pleaded, the jury found a ſpecial verdict, That *A.* was tenant for life of the lands in queſtion, and that *B.* had the remainder in fee, and that *A.* was living; on this finding, it was adjudged againſt the plaintiff; for it was not the leaſe of *A.* and *B.* but the leaſe of *A.* during his life, and the confirmation of *B.*

Cro. Jac. 166. Co. Lit. 200. *a.* 2 Wilſ. 232. So, an ejectment cannot be maintained on a joint-leaſe by tenants in common; for, as they are in by ſeveral titles, the freehold is ſeveral, and conſequently each cannot demiſe the whole. There ſhould therefore be a diſtinct count on the demiſe of each, or they may join in a leaſe to a third perſon, and ſuch perſon may make a leaſe to try the title.

2 Str. 1181. But joint-tenants may join in a leaſe to try the title: for being ſeiſed *per my et per tout*, each has title to the whole, wherefore the demiſe of each is good.

1 Ld. Raym. 726. For the ſame reaſon, co-parceners, it has been held, may join in a leaſe to the plaintiff in ejectment, *tamen quære de hoc*; for where in ejectment the plaintiff declared of a leaſe, by two co-parceners, *quod demiſerunt*, exception being taken to it, the exception was allowed, becauſe the leaſe was ſeveral as to each co-parcener for her reſpective moiety; for though they have but one freehold with regard to their anceſtor, and therefore if they are diſſeiſed ſhall join in an aſſiſe, yet as to their diſpoſing power thereof they have ſeveral rights and intereſts, ſo that neither of them can leaſe or give away the whole.—The uſual mode, however, is to join in a leaſe to a third perſon who demiſes to the plaintiff; for a demiſe of all the parts is a demiſe of the whole.

Bac. on Lea. 194.

Cro. Eliz. 469. Where the leſſor of the plaintiff claims by leaſe, under a copyholder, he muſt ſhew that by the cuſtom of the manor, [or by licence of the lord, *com. ſemb.*] the copyholder may let ſuch leaſes for years: for if this be not ſet out in the declaration, and the count be general, it ſhall be eſteemed a leaſe at common law, which a copyholder cannot make.

A leaſe

A leaſe by a copyholder for three years under a licence to let for twenty-one years is good; and the leſſee may bring ejectment on it at the common law. *Ibid.* 535.

Indeed, a copyholder may declare on a leaſe for any number of years, without forfeiture; and the leſſee of a copyholder, for a year, may ſuſtain an ejectment: for his eſtate is warranted by law, and it is the moſt ſpeedy way for him to recover the poſſeſſion. Run.Eject. 226.

A. a copyholder, covenants to aſſign and ſurrender to *B.* which covenant is preſented by the homage, but before any ſurrender *B.* aſſigns his intereſt to *C.* to whom *A.* ſurrenders; *C.* has a right to be admitted on payment of a fine for his own admittance only. 2 T. R. 484.

Of amending the Declaration.

It is a rule both in the Court of King's Bench and that of the Common Pleas, that no declaration in ejectment can be amended before appearance, and that after appearance it can only be amended in form, not in matter of ſubſtance. 2 Sell. Prac. 228.

But amendments are now carried further than formerly, and that which uſed to be deemed ſubſtance, (as the demiſe, *&c.*) is now held matter of form, and amendable. *Ibid.*

Thus, where the ejectment was to avoid a fine, and the demiſe was laid before the plaintiff had made the entry, inſtead of after, it was on motion, ordered to be amended; Lord *Mansfield* obſerving that demiſe is mere matter of form; it did not exiſt. 4 Bur. 2447.

So, if the term demiſed to the plaintiff is expired, or likely to expire, before trial, the court will now upon motion to amend, enlarge it upon payment of coſts. So, the term was ordered to be enlarged, after it had expired twelve years; though the cauſe was at iſſue, and ſpecial jury ſtruck, and the parties gone down to trial, before the miſtake was diſcovered.—For an ejectment is the creature of the Court, and open to every equitable regulation for expediting the true juſtice of the caſe. 2 Bl. R. 940. Cowp. 841.

But if the fault go to the title, or is in the proceſs, it is not amendable. 2 Str. 1211.

As where in the declaration delivered to the tenant in poſſeſſion, the ſaid "*James*," inſtead of "*John*," was ſaid

to

to enter by virtue of the demiſe, the Court refuſed to amend it, for they conſidered it as proceſs: and Juſtice *Wright* cited a caſe, where the premiſſes were laid to lie "in "*Twickenham* or *Iſleworth*, or one of them," and the Court refuſed to let the plaintiff amend, by ſtriking out the disjunctive words.

2 Sell. Prac. 218. Yet in a later caſe, an amendment has been made in the parcels and in the name of the plaintiff for the defendant.

Of Service of the Declaration, Affidavits thereof, &c.

2 Str. 1064. The declaration being conſidered as proceſs to bring in the tenant, muſt therefore be perſonally ſerved upon him, if it be known where he lives, and his reſidence be not on the premiſſes for which the ejectment is brought.

2 Bl. R. 800. Salk. 255. Run. Eject. 156. But if the tenant himſelf cannot be found, ſervice on his wife or child, or on his ſervant, on the premiſſes, will be held good ſervices. If however, it be on the ſervant, ſome acknowledgment by the tenant or his wife ſhould be made to render it ſufficient; and that though it may not clearly appear that the declaration came to hand before the eſſoin day of the term.—But perhaps delivery to a ſervant at the tenant's dwelling houſe, and explaining the meaning of it, would be now ſtrong preſumptive evidence for the jury to conclude that it reached the tenant.

4 T. R. 464.

If however the tenant abſcond, it is uſual to ſerve the declaration on ſome perſon reſiding at his houſe; and if that cannot be done, to affix the ſame upon the door; and then, on an affidavit of the circumſtances, to move the Court for a rule upon the tenant to ſhew cauſe why ſuch ſervice ſhould not be deemed good ſervice, upon which the Court will preſcribe the mode of ſerving the rule, which is generally made abſolute upon affidavit of its ſervice.

Bar. 192. 2 Bur. 1116. Thus, in ſuch caſe, upon ſervice on the tenant's niece, who was the only manager of his houſe and reſident in it, and fixing up another copy on the premiſſes, the Court made a rule to ſhew cauſe why judgment ſhould not be entered up againſt the caſual ejector; and further ordered, that notice of ſuch rule to any perſon in the houſe ſhould be ſufficient, and that if no perſon were in the houſe, it ſhould then be affixed to the door of the houſe.

So,

So, where the tenant in poſſeſſion was perſonated at the time of the ſervice by another who accepted the ſervice in her name, the Court made a rule to ſhew cauſe, why this ſhould not be deemed good ſervice upon the tenant herſelf, and why judgment ſhould not be ſigned againſt the caſual ejector, on default of her appearing: and that leaving a copy of this rule at her houſe with ſome perſon there, or, if no one was to be met with, affixing it on the door, ſhould be good ſervice of it. This rule was made abſolute upon an affidavit "that the tenant was either not at home, or, if "at home, was denied; and that her ſervant maid was at "home, but could not be ſerved; whereupon a copy of the "rule was affixed on the door of the houſe:" and moreover "that at a ſubſequent day" upon a doubt whether what had been already done was ſufficient, "the maid be-"ing at home and opening the window, but refuſing to open "the door, and denying that her miſtreſs was at home, an-"other copy was affixed to the door, and the maid was told "the effect of it; and another copy was thrown in at the "window, and the original rule was ſhewn to the maid." *Ibid.* 1182.

Such rules will be granted with a retroſpect: for a like rule to ſhew cauſe why a preceding ſervice of an ejectment upon a ſervant in the houſe of one *Hawkins*, tenant in poſſeſſion, ſhould not be deemed good ſervice of it, was made on the ſecond day of the term, on its appearing that *Hawkins* and his wife both kept out of the way to prevent their being perſonally ſerved. The rule was made with a retroſpect in order that the plaintiff might not loſe the aſſizes. *Ibid. in Marg.* 1 Bl.R.290. *ſ.c.*

So, in another caſe, a rule was granted and afterwards made abſolute, that ſervice of a declaration in ejectment at the houſe of a tenant in poſſeſſion, on a day paſt, might be good ſervice; and that ſervice of the firſt rule at the houſe of the ſaid tenant, ſhould be good ſervice. *Ibid.* 317.

So, leaving the ejectment at the houſe, was ruled to be ſufficient ſervice, it appearing that the ſervant had refuſed to receive it, having been ordered by his maſter not to take in any papers. 1 Str. 575.

So, tender of the declaration, and reading the notice aloud, though the tenant refuſed to receive it; or runs away Sell.Pract. 173.

and

and ſhuts the door; or threatens with a gun to ſhoot the perſon ſerving it if he came near, have been held good ſervice upon application to the Court, who act diſcretionally in this matter, according to the exigency of the caſe.

Ibid. 174. Barnes, 181. A declaration ſerved on the church-wardens and overſeers of a pariſh, who rented a houſe for harbouring ſome of the pariſh poor, and did not otherwiſe occupy the houſe than by placing the poor in it, was deemed ſufficient ſervice and a rule made for judgment.

So, in ejectment for a chapel, if ſervice of the declaration be made on the chapel-wardens, or on the perſon entruſted with the keys of the chapel, it will be ſufficient.

Sell. Pract. 174. Bar. 190. On affidavit that one of the tenants is a lunatic, and that one *C.* lives with her, tranſacts her buſineſs, and has the ſole conduct thereof, and of her perſon, but would not permit the deponent to have acceſs to her, in order to ſerve her with the declaration; whereupon he delivered it to the ſaid *C.* a rule was made for the lunatic and *C.* both to ſhew cauſe, why ſuch ſervice ſhould not be good; and ſervice of the rule on the ſaid *C.* be good.

Bull. N. P. 98. If there be ſeveral tenants in poſſeſſion, the plaintiff muſt deliver a declaration to each of them: but where the name of each was prefixed to the notice ſerved on him, it was held that one rule only was neceſſary on motion for judgment againſt the caſual ejector.

Affidavit of Service. 7 T. R. 477. 1 Lil. Pr. Reg. 499. Run. Eject. 158. The declaration having been delivered, the perſon who delivered it muſt make affidavit (except in the caſe of vacant poſſeſſion) that he delivered to the tenant or his wife, *&c.* a true copy of the declaration, and read or explained to him the notice annexed thereto. If a declaration was ſerved on the child or ſervant of the tenant, the affidavit muſt ſtate further, "that the ſervice was afterwards acknowledged by "the tenant."—The affidavit muſt be poſitive, namely, that *A. B.* was tenant in poſſeſſion, or that he acknowledged himſelf to be ſo: becauſe no one ſhould be evicted from poſſeſſion without a poſitive affidavit, on which, if it be falſe, the perſon who made it may be legally and effectually ſubjected to the penalties of perjury.

Bar. 173. Affidavit of ſervice on *A. B.* tenant in poſſeſſion, or *C.* his wife, is not ſufficiently certain as to either.

So,

So, if ſervice on the wives of *A.* and *B.* who, or one of them are tenants, was held not good. *Ibid.* 174.

When ſeveral tenants have been ſerved with copies of the declaration, if it is meant but as one ejectment and to be followed by one judgment, one affidavit of the ſervice of all is ſufficient, annexed to the copy of one declaration. But if the ejectments are made ſeveral, ſo as to have ſeparate judgments, writs of poſſeſſion, *&c.* then an affidavit muſt be annexed to ſeparate copies of the ejectment of the ſervice ſeparately. 2 Sell. Pract. 178

Moving for Judgment.

Upon the affidavit of ſervice, the plaintiff moves for judgment againſt the caſual ejector, which is always granted, unleſs the tenant in due time, enter into the common rule to confeſs leaſe, entry and ouſter.—This motion for judgment is a ſide bar, but where there is any thing in the ſervice of the declaration out of the common way, it ſhould be mentioned to the Court, and where the affidavit of ſervice is defective, the Court of King's Bench will give leave to file a ſupplemental affidavit. Tidd's Pract. K. B. 260. *in n.*

Although judgment againſt the caſual ejector be ſigned, yet if no poſſeſſion is given, or trial loſt, it may on an affidavit of merits and payment of coſts, be ſet aſide. Sell. Pract. 178.

In the King's Bench, if the premiſſes are ſituate in *London* or *Middleſex*, and the notice requires the tenant to appear on the firſt day, or within the firſt four days of the next term, the plaintiff ſhould regularly move for judgment againſt the caſual ejector in the beginning of that term: and then the tenant muſt appear within four days incluſive after the motion, or the plaintiff will be entitled to judgment. If however the motion be deferred till the latter end of the term, the Court will order the tenant to appear in two or three days, and ſometimes immediately, that the plaintiff may proceed to trial at the ſittings after term; though if the motion be not made before the laſt four days of the term, the tenant need not appear until two days before the eſſoin-day of the ſubſequent term: and ſhould the notice in ſuch caſe require the tenant to appear in the next term generally, the tenant has the whole of that term to appear in. Run. Eject. 165.

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Ibid. In the Common Pleas, if the premiſſes are ſituate in *London* or *Middleſex*, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment againſt the caſual ejector for default of appearance, unleſs ſuch motion be made within one week next after the firſt day of every *Michaelmas* and *Eaſter* terms, and within four days next after the firſt day of every *Hilary* and *Trinity* terms.—But it has been holden that this rule does not extend to the caſe of a vacant poſſeſſion, under the ſtat. 4 *G.* 2.

Ibid. 166. In country cauſes, though the declaration be delivered before the eſſoin-day of *Eaſter* or *Michaelmas* term, yet the tenant, in both Courts, is allowed till four days after the next iſſuable (that is, *Hilary* or *Trinity)* term to appear; and if the cauſe ariſe in *Cumberland*, or in any other county where the aſſizes are held but once a year, the tenant need not appear till four days after the term preceding the aſſizes.—But in the King's Bench the plaintiff muſt move for judgment the ſame term in which the tenant has notice to appear: though the practice is different in the Common Pleas, for there he may move for judgment at any time during the next iſſuable term.

By a late rule of the Court of King's Bench, the clerk of the rules is to keep a book, in which is to be entered all the rules which ſhall be delivered out in ejectments, inſtead of that formerly kept which contained a liſt of the ejectments moved. The entry is to ſpecify the number of the entry; the county in which the premiſſes lie; the name of the nominal plaintiff; the firſt leſſor of the plaintiff, (with the words "and others," if more than one,) and alſo the name of the caſual ejector: and unleſs the rule for judgment be drawn up and taken away from the office of ſuch clerk within two days after the end of the term in which the ejectment ſhall be moved, no rule is to be drawn up or entered, nor any proceeding had in ſuch ejectment.

By ſtat. 11 *G.* 2. *c.* 19. the tenant muſt give notice to his landlord of any declaration in ejectment being delivered, under pain of forfeiting three years improved or rack-rent of the premiſſes ſo had and enjoyed by the tenant.

A tenant

A tenant to a mortgagor who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of this ſtatute: for the act expreſsly permits an ejectment to be brought for ſuch purpoſe; and extends only to caſes where ejectments are brought which are inconſiſtent with the landlord's title. 1 T. R. 467.

But where the tenant had not given notice to his landlord of the ejectment, and there was judgment againſt the caſual ejector, the Court ſet aſide the judgment and ordered the tenant to pay all the coſts to the leſſor of the plaintiff on the landlord's entering into the uſual rule to try the title. Or the landlord may bring a writ of error, which operates as a *ſuperſedeas* of the proceedings under the ſtatute, and thereby ſtay execution. 4 Bur. 1996. 2 Str. 1241.

Section II. *Who may defend the Action of Ejectment, &c.*

The Tenant.

The tenant in poſſeſſion muſt apply to the Court to be made defendant in the room of the caſual ejector. This is done on condition that he confeſſes leaſe, entry, and ouſter.

By the common law, no perſon is permitted to defend in ejectment, unleſs he be tenant, and is or hath been in poſſeſſion, or receipt of the rent: for, beſides that it was champerty for any perſon to interpoſe and cover the poſſeſſion with his title, if the party would make any perſon defendant with another, who was not concerned in the poſſeſſion of the tenements, it was a miſchief at the common law, becauſe if the plaintiff recover againſt one of the defendants, the ſtranger had no remedy for his coſts; but this is remedied by 8 & 9 *W.* 3. *c.* 10. whereby coſts are given to ſuch ſtrangers, unleſs the Judge certifies, immediately on the trial, that the party had probable cauſe for making him defendant.

Moreover, as the tenant in poſſeſſion could not be compelled to appear and enter into the common rule to become defendant inſtead of the caſual ejector; ſo neither could the landlord alone, without joining with the tenant, enter into ſuch rule, and be made ſole defendant.

The Landlord.

To remedy this inconvenience, by ſtat. 11 *G.* 2. *c.* 19. *s.* 13. it is enacted, That it may be lawful for the Court, where ſuch ejectment ſhall be brought, to ſuffer the landlord to

make himſelf defendant, by joining with the tenant, in caſe he ſhould appear; but in caſe ſuch tenant ſhall neglect or refuſe to appear, judgment ſhall be ſigned againſt the caſual ejector, for want of ſuch appearance: but if the landlord, *&c.* of any part of the lands, *&c.* for which ſuch ejectment was brought, ſhall deſire to appear by himſelf, and conſent to enter into the like rule, that by the courſe of the Court, the tenant in poſſeſſion, in caſe he or ſhe had appeared, ought to have done; then the Court, where ſuch ejectment ſhall be brought, ſhall and may permit ſuch landlord ſo to do; and order a ſtay of execution upon ſuch judgment againſt the caſual ejector, until they ſhall make further order therein.

Salk. 257. The landlord's right to be joined in defending the premiſſes is affirmed by this ſtatute, for he had ſuch right before; and it is optional in him to be made defendant or not, for the Court cannot compel him.

The Court, however, has no juriſdiction, it ſeems, to admit any perſon to defend inſtead of the tenant, but the landlord. In the conſtruction, however, of the ſtatute, the word "landlord" is extended to all claiming title conſiſtent with the poſſeſſion of the occupier, for it need not be the actual landlord, but it is ſufficient if he have an intereſt only in the land. A purchaſer, therefore, of a reverſion, which appeared to be a pretended title, and where no rent had ever been paid, was held to be admiſſible as a defendant. So, it ſhould ſeem, a mortgagee out of poſſeſſion may

3 T. R. 713. now be admitted to defend, on the tenant's refuſal. But a deviſee (*ceſtui que truſt*) out of poſſeſſion is not deemed a landlord within the meaning of the act: for upon a motion to permit certain deviſees to defend inſtead of the tenant, it was oppoſed on the ground that the deviſees had never been in poſſeſſion, and could not, therefore, be conſidered as landlords under 11 *G.* 2. *c.* 19. *s.* 13. and Lord *Kenyon* ſaid, If the perſon requiring to be made defendant under the Act, had ſtood in the ſituation of immediate heir to the perſon laſt ſeiſed, or had been in the relation of remainder-man under the ſame title as the original landlord, I am of opinion that he might have been permitted to defend as a landlord by virtue of the directions of the ſtatute; but here, the very

very queſtion in diſpute, between the adverſe party and himſelf, is, Whether he is entitled to be landlord or not: we, therefore, are not authoriſed to extend the proviſion of the ſtatute to ſuch a caſe as this. As to the caſe mentioned, it appears to have been by conſent.—A deviſee in truſt, however, may defend as landlord. So; an heir who had never been in poſſeſſion. So, the heir at law or remainder-man under the ſame title. 3 Bur. 1290. 4 T. R. 122.

So, if an ejectment be brought by one claiming as heir of a copyhold, and the lord of a manor, who claims by eſcheat *pro defectu hæredis*, applies to be admitted defendant either with the tenant or alone, the Court will direct the lord to bring this action againſt the heir, and the heir will be admitted to defend. If the lord refuſes, they will diſcharge his rule to be admitted; if the heir refuſes, they will admit the lord to defend. 3 Bur. 1290.

On the landlord being made a defendant under 11 *G.* 2. *c.* 19. on non-appearance of the tenant, the Court will ſtay execution againſt the caſual ejector.

But where the landlord is permitted to defend without the tenant, judgment is always firſt ſigned againſt the caſual ejector; the reaſon of which is that, under it, the plaintiff, if he obtain a verdict, may get poſſeſſion of the premiſſes ſued for, which he could not do by virtue of a judgment againſt a perſon out of poſſeſſion. 2 Sell. Pract. 186.

As to the time when the landlord may be admitted defendant, a caſe occurred, in which judgment had been regularly obtained againſt the caſual ejector by default:—the landlord of the premiſſes moved to ſet it aſide, becauſe his tenant had not given him any notice of his having been ſerved with the declaration in ejectment. The plaintiff inſiſted that his judgment was perfectly regular; and that the tenant's omitting to give his landlord notice of the declaration being delivered was merely a matter between the landlord and his tenant, which could not affect the plaintiff's regular judgment, which had been fairly and duly obtained. The Court, however, were clearly of opinion that the poſſeſſion ought not to be changed by a judgment in ejectment where there had been no trial or opportunity of trying; for the obtaining judgment might be owing 4 Bur. 1996.

to the default or even treachery of the defendant's own tenant. But if the plaintiff had not been guilty of any collusion with the tenant, they thought it reasonable that the tenant, who was the person guilty of the default, should pay the costs: for the rule of the Court, which requires service upon the tenant in possession, is calculated with a view that the tenant should give notice to his landlord, in order that the ejectment cause might be tried between the proper parties interested in the question.

2 Sell. Pract. 187. If judgment be signed, it is too late for the landlord to be made defendant. But the landlord may be let in after judgment when signed in consequence of the tenant's not giving notice.

2 Bl. R. 1259. But in no event will the Court endure that a lessee defend alone against his landlord, or those who claim under him, on a supposed defect of title.

A third Person. *Ibid.* 185. In all cases, if the person who wishes to defend be neither tenant nor actual landlord, but has some interest to sustain, he must move the Court, on an affidavit of the fact, to be made a defendant, instead of, or with, the casual ejector; and the tenant's consent is not now necessary.

Bull. N. P. 98. If a material witness for the defendant be also made a defendant, the right way is for him to let judgment go by default; but if he plead and by that means admit himself to be tenant in possession, the Court will not afterwards upon motion strike out his name. In such cases, however, if he consent to let a verdict be given against him for as much as he is proved to be in possession of, no reason appears why he should not be a witness for another defendant.

Consolidation Rule. Run. Eject. 187. Where there are several defendants, to whom the plaintiff delivers declarations, who are severally concerned in interest, and the plaintiff moves to join them all in one declaration, yet the Court will not do it, but the plaintiff must deliver several declarations to each of them; because each defendant must have a remedy for his costs, which he could not have if they were joined in one declaration, and the plaintiff prevailed only against one of them: and by this means the plaintiff might have a tenant of his own defendant with others, in order to save the costs.

Ibid. But where several ejectments are brought for the same premisses,

premiſſes, upon the ſame demiſe, the Court on motion, or a Judge at his chambers, will order them to be conſolidated: the motion is for a rule to ſhew cauſe.

Appearance. The appearance, therefore, may be either by the tenant himſelf, (as when he is in poſſeſſion of his own eſtate, or agrees with his landlord to defend the action, or it is an ejectment by the landlord againſt his tenant, or the like,) or it may be by the tenant and the landlord jointly, or if the tenant refuſes, it may be by the landlord alone.

2 Sell. Pract. 179. The appearance in all the above caſes is effected in the ſame manner, except only that in the two laſt, counſel's ſignature muſt be got to a motion, which is of courſe to admit the landlord to defend, either with the tenant, or by himſelf if he refuſes to appear, and a rule got from the clerk of the rules accordingly. Alſo, if the tenant refuſe to appear, *Ibid.* 187. an affidavit of ſuch refuſal ſhould be made; for the tenant is not obliged to appear in ejectment though the landlord is ready to indemnify him. Nor can an attorney, by order of the landlord, appear for the tenant: ſuch appearance and plea would be irregular, and ordered to be withdrawn.

Ibid. The appearance in this action ſhould be entered of the term mentioned in the notice; and where the notice to appear was in *Hilary*, and the tenant entered an appearance in *Michaelmas* following, and did nothing farther, and the plaintiff, finding no appearance of *Hilary*, and no common rule entered into or pleaded, ſigned judgment againſt the caſual ejector, the Court held it regular; but afterwards ſet it aſide to try the merits.

Run. Eject. 190. Touching the common or conſent rule, it ſhould be remembered that judgment againſt the caſual ejector is always granted, unleſs the tenant in due time (that is, within the time allowed for his appearance) enters into the common rule to confeſs leaſe, entry, and ouſter. But if the tenant or his landlord wiſhes to defend the action, he muſt, within that time, conſtitute an attorney, who will make out the common rule, and leave it, with the general iſſue, at a Judge's chambers in the King's Bench, or at the Prothonotary's office in the Common Pleas. This rule is in ſubſtance nearly the ſame in both Courts; and the purport of it is, that the tenant or other defendant ſhall immediately

appear, receive a declaration, plead not guilty in a plea of treſpaſs and ejectment for the tenements in queſtion; and that upon trial of the iſſue, he ſhall confeſs leaſe, entry, and ouſter, and inſiſt upon the title only: the effect of the rule being to bring the matter to the mere queſtion of the plaintiff's poſſeſſory title.

In all caſes, except that of ejectment brought to avoid a fine, (where there muſt be an actual entry,) the confeſſion of leaſe, entry, and ouſter, is ſufficient to bar a nonſuit for want of proof of actual ouſter. It is ſufficient therefore in an ejectment brought for a condition broken; or by one tenant in common againſt another.

Run. Eject. 202. The common rule, being made by aſſent of both parties, an attachment lies for the non-performance of it, as of all other rules of Court that are diſobeyed; and this is all the remedy which the parties on both ſides have for their coſts.

Ibid. 203. If there be ſeveral perſons who claim title, the rule may be drawn either generally or ſpecially: generally, as that *A.* who claims title to the premiſſes in queſtion in his poſſeſſion, be admitted defendant for thoſe premiſſes; which puts a neceſſity upon the plaintiff to diſtinguiſh, by proof at the trial, what tenements are in each defendant's poſſeſſion; becauſe, by the rule, he is only to confeſs for the premiſſes in his own poſſeſſion; and if the plaintiff cannot diſtinguiſh, by proof, what tenements are in each defendant's poſſeſſion, he can have no verdict, conſequently no judgment. Or the rule may be drawn ſpecially at the diſcretion of the defendant: as that *A.* who claims title to ſuch and ſuch premiſſes, (expreſſing them particularly,) be admitted defendant; which ſuperſedes the neceſſity of proof, that the premiſſes are in his poſſeſſion.—If the tenant enters into the common rule, for ſo much of the premiſſes as are in his poſſeſſion, his attorney muſt, by rule of Court, immediately deliver to the plaintiff's attorney a note in writing thereof; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may ſummon him before a Judge, who will order the rule thus ſpecially to be drawn up, in caſe the party in poſſeſſion will himſelf be defendant: but becauſe the defendant's attorney is to draw

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up the rule, it being entered into by his conſent, it is often drawn up in general terms, which puts the plaintiff to proof at the trial.

The leſſor of the plaintiff is bound at the trial to prove the defendant in poſſeſſion of the premiſſes which he ſeeks to recover, notwithſtanding that the defendant has entered into the general conſent rule to confeſs leaſe, entry, and ouſter, if the defendant conteſt his poſſeſſion. 7 T. R. 327.

But now the practice is to inſert in the margin of the conſent rule, the premiſſes to be defended, ſtating that they are part of the premiſſes mentioned in the declaration, which makes the rule ſpecial, and thereby ſuperſedes the neceſſity, as we have before obſerved, of the plaintiff proving in whoſe poſſeſſion the premiſſes are. 2 Sell. Pract. 181.

When the appearance is for part, the plaintiff may ſign his judgment againſt the caſual ejector.

That the leſſor of the plaintiff, however, may the better know what exact part of the premiſſes are defended, the defendant's attorney ſhould give notice to the plaintiff's attorney what the premiſſes are.

In certain caſes, the Court will ſtay the proceeding in ejectment, on a motion for a rule to ſhew cauſe. *Proceedings, when ſtayed.*

Thus, where the leſſor of the plaintiff is unknown to the defendant, the latter may call for an account of his reſidence or place of abode, from the oppoſite attorney; and if he refuſe to give it, or give in a fictitious account, of a perſon who cannot be found, the Court will ſtay the proceedings until ſecurity be given for the payment of coſts. Tidd's Pract. K. B. 282.

Alſo, in an ejectment on a clauſe of re-entry for non-payment of rent, under the ſtat. 4 *G.* 2. *c.* 28. (of which hereafter) proceedings will be ſtayed at any time before execution executed, on the tenant bringing into Court all the rent in arrear and coſts. *Ibid.* 291.

So, in ejectment by a mortgagee, for the recovery of the poſſeſſion of the mortgaged premiſſes, or in debt on bond conditioned for the payment of the mortgage money, or performance of covenants in the mortgage deed, where no ſuit in equity is depending for a foreclоſure or redemption, by ſtat. 7 *G.* 2. *c.* 20. if the perſon having a right to redeem

ſhall at any time, pending the action, pay to the mortgagee, or in caſe of his refuſal bring into Court all the principal monies and intereſt due on the mortgage, and alſo coſts to be computed by the Court, or proper officer appointed for that purpoſe, the ſame ſhall be deemed and taken to be in full ſatisfaction and diſcharge of the mortgage; and the Court ſhall diſcharge the mortgagor of and from the ſame accordingly.

Tidd's Pract. K. B, 392. Upon this ſtatute the Court ſtayed proceedings, although it was objected that the defendant had agreed to convey the equity of redemption to the plaintiff: and if there be any doubt, as to the amount of what is due, the Court of King's Bench will refer it to the Maſter, and that of Common Pleas to the Prothonotary, whoſe reſpective duty it is to tax the coſts; and if the debt and coſts are not paid, the plaintiff muſt proceed in the action, and cannot have an attachment.

7 T. R. 285. The Court however will not ſtay proceedings in an ejectment brought by a mortgagee againſt a mortgagor, on the latter paying principal, intereſt, and coſts, if the latter has agreed to convey the equity of redemption to the mortgagee.

2 Sell. Pract. 220. A motion was to ſtay proceedings in ejectment on payment of mortgage money and coſts, purſuant to this act; on ſhewing cauſe, the plaintiff produced an affidavit that the mortgagee had been at great expence in neceſſary repairs of part of the premiſſes in his poſſeſſion, (the ejectment was brought for the reſidue,) and therefore prayed, that the Prothonotary might be directed to make allowance for ſuch repairs. *Per Cur.*—The rule muſt follow the words of the ſtatute: the Prothonotary will make juſt allowances and deductions.

2 Bl. R. 726. But, where there were two mortgagees, the Court will not ſtay proceedings and compel a redemption of one mortgagee only, upon payment of the principal, intereſt, and coſts, on that mortgagee, without paying the reſt.

2 Sell. Pract. 220. A Judge made an order purſuant to this Act, to ſtay the mortgagee's proceeding in ejectment, upon bringing principal, intereſt, and coſts into Court; and a rule was made to make the order a rule of Court *niſi*: but it afterwards appearing to the Court, that notice had been given by the mortgagee

mortgagee to the mortgagor that he insisted upon payment of two bonds, which were a lien upon the estate, the case was adjudged to be out of this act, and the rule *nisi* was discharged.

But where a rule, on the statute, to shew cause why proceedings should not be stayed on payment of the mortgage-money and costs, was made absolute; upon the lessors of the plaintiff, who were assignees of the mortgagee, insisting to be paid a bond and a simple contract debt due to themselves in their own right: *per Cur.*—A bond is no lien in equity, unless where the heir comes to redeem.

The practice now is, to stay proceedings by summons before a Judge. 1 Str. 413. *in n.*

Proceedings also will in some cases be stayed: as in that of an infant lessor of the plaintiff; that of the death of plaintiff's lessor, perhaps; that of the defendant residing abroad; and, where a former ejectment has been brought.

By the practice of making a rule to stay proceedings in this action, on the demise of an infant, until a responsible plaintiff be named, or security be given for the payment of costs, if an infant deliver a declaration to a defendant, some friend or guardian must be set up as plaintiff, to be responsible to the defendant for his costs. But if such person die insolvent, so that the defendant cannot derive any benefit from the rule, the infant himself must answer for the costs: the rule was made for his benefit; and an infant must not disturb the possession of others, by unlawful entries, without being liable to costs.—Previous, however, to any motion in Court, enquiry should be made, whether there be a real and substantial plaintiff, or not: for on enquiry, the guardian may undertake to pay the costs; and in case he should, the Court would probably decline to interpose. Run. Eject. 188.

It has likewise been holden, that upon the death of the plaintiff's lessor, the proceedings may be stayed, till the plaintiff shall have given the defendant security for his costs. 2 Str. 1056.

So, where an ejectment was brought on the demise of a person residing at *Antigua*; and in another case, where the lessor of the plaintiff resided in *Ireland*, the plaintiff was 2 Bur. 1177.

compelled to give the defendant a ſimilar ſecurity: in the latter caſe he was compelled to do it, although it was an ejectment brought under the direction of the Court of Chancery, where the bill was retained till after the trial of the ejectment and ſecurity had already been given there; which ſecurity, however, was only for 40*l.*

8 T. R. 645. Proceedings were ſtayed till the coſts of a former ejectment brought by the father of the leſſor of the plaintiff againſt the defendant's father on the ſame title, were paid.

But, excepting ſuch inſtances, and that of a former ejectment, the Court will not compel the leſſor of the plaintiff to give ſecurity for the coſts.

1 T. R. 491. Therefore, a rule was refuſed, for the leſſor of the plaintiff to give ſecurity for the coſts of an ejectment depending. *Buller* J. ſaid—The application is not warranted by any authority. There are only three inſtances in which the Court will interfere on behalf of a defendant, to oblige the plaintiff to give ſecurity for his coſts. The firſt is, when an infant ſues; then the Court will oblige the *prochein amy*, or guardian, or attorney, to give ſecurity for the coſts: ſecondly, where the plaintiff reſides abroad, in which caſe the Court will ſtay proceedings till ſecurity be given for the coſts: and thirdly, where there has been a former ejectment; but there the rule is to ſtay the proceedings in the ſecond ejectment till the coſts of the former are paid, and not till ſecurity be given for the coſts of the ſecond.

Of the Plea and Iſſue; &c.

Run. Eject. 234. The general rule in the iſſue of this action is, that whatever bars the right of entry is a bar to the plaintiff's title. The plaintiff muſt, therefore, prove ſeiſin within twenty years in himſelf or his anceſtors; or muſt prove ſeiſin in a third perſon, of a particular eſtate in the land, and that he claimed within twenty years after the reverſion accrued; or that he or ſhe was an infant, feme covert, *non compos*, impriſoned, or beyond the ſea, at the time when the title accrued, and that he claimed within twenty years after he came of age, *&c.* or otherwiſe became a free agent by ſuch diſability ceaſing: for every plaintiff in ejectment muſt ſhew a right of poſſeſſion as well as of property; and there-

fore

fore the defendant need not plead the ſtatute of limitations, as in other actions.

A fine and non-claim, or a diſcent caſt, which take away the entry, are good pleas in this action, in bar of the plaintiff's right of entry. *Ibid.* 235.

So, an accord with ſatisfaction is a good plea, for it is an action of treſpaſs in its nature. *Ibid.*

So, by permiſſion of the Court, the defendant may plead to its juriſdiction: which permiſſion the Court will grant before judgment *niſi* againſt the caſual ejector. 1 Bl. R. 197. 2 Sell. Pract. 189.

Antient demeſne, therefore, may be pleaded: but application to plead it muſt be made within the firſt four days; and there muſt be an affidavit, ſtating that the lands are holden of a manor, which is antient demeſne; that there is a Court of Antient Demeſne regularly holden; and that the leſſor of the plaintiff has a freehold intereſt. Tidd's Pract. K. B. 327.

The opinion of the Court, touching this plea, was pretty clearly manifeſted in a motion for leave to plead it being denied, by reaſon of ſufficient ground not being ſhewn to ſupport it: on which occaſion Mr. J. *Foſter* obſerved, that as it was agreed to be neceſſary to aſk the leave of the Court to plead this plea to a declaration in ejectment, it followed of courſe that it muſt be in the diſcretion of the Court either to grant or refuſe their leave: and he thought that the affidavit in the principal caſe was not ſufficient to ouſt that Court of its juriſdiction. He ſpoke of theſe Courts of Antient Demeſne as putting people out of the protection of the law, and fitter to be totally deſtroyed than to be favoured and aſſiſted. Mr. J. *Wilſon* ſaid, it was a ſtrange, wild juriſdiction; where the jurors are judges both of law and of fact, and ignorant country fellows are to determine the niceſt points of law: and therefore he was not for granting ſuch leave, unleſs compelled by authority. Indeed, if the caſe is brought ſtrictly within the rule, then the leave *muſt* be granted: we cannot help it.—The authorities down from *Alden*'s caſe [5 *Co.* 105] to this time, it is true, are "That antient demeſne is a "good plea in ejectment." But if you would ouſt this court of juriſdiction, you muſt ſhew "that another court "has 2 Bur. 1047.

" has juriſdiction." Now this affidavit does not ſhew " that there are ſuitors in the other court," nor " that " theſe lands are holden of a manor, which manor is holden " in antient demeſne:" whereas, if the lands only, and not the manor, are antient demeſne, the matter cannot be tried in the court of that manor. The affidavit ought to have ſhewn " That the lands are holden of a manor, which " manor is antient demeſne." It cannot be tried " Whe- " ther the lands themſelves are antient demeſne." Doomſ- day will not ſhew this. Doomſday will only ſhew whether the manor is ſo or not. The form of the plea makes this as clear as the ſun. It ought alſo to be ſhewn that the leſſor of the plaintiff has a freehold. How can he ſue there in ejectment as leſſee of a term? Upon ſuch a ſtrange, wild juriſdiction as this, and upon ſuch an affidavit, I am not for giving the defendant leave to plead this plea. Rule diſ- charged.

Run. Eject. 238. In every ſuch plea, therefore, the plaintiff muſt ſtate another juriſdiction: as, if an action be brought here for a matter ariſing in *Wales*, to bar the remedy ſought here, the juriſdiction of the Court in *Wales* muſt be ſhewn; and in every caſe, to repel juriſdiction here, the party muſt ſhew a more proper and ſufficient juriſdiction elſewhere.

Ibid. Pleas either in bar or in abatement of the action are now, however, ſeldom, if ever, pleaded: for, according to the modern practice, the defendant, if he appear, is generally bound by the conſent-rule, to plead the general iſſue of not guilty: but where an ejectment was intended to try the right to a rectory, the defendant was admitted to plead that he himſelf was rector, and to traverſe the rectorſhip of the plaintiff's leſſor, in order by that means to bring the right in queſtion.

Ibid. For the moſt part, however, the defendant can plead the general iſſue only: which is therefore uſually left, with the conſent-rule, at the Judge's chamber, or the Prothonotary's office. But if it be not ſo left, the plaintiff muſt give a rule to plead; and then judgment may be entered for want of a plea, as in other actions, without a ſpecial motion in Court for the purpoſe.

The

The preſent practice of delivering a declaration to the caſual ejector before the Term, forces the defendant to iſſue the ſame Term. *Ibid.*

In making up the iſſue, the firſt declaration muſt not be varied from, except in the defendant's name. 2 Ld. Raym. 1411.

According to the words of the rule for judgment againſt the caſual ejector, unleſs the tenant appears, a new declaration againſt him ſhould in ſtrictneſs be delivered before a plea in form can be required. 2 Sell. Pract. 188.

Where the name of the plaintiff's leſſor was inſerted in the body of the plea (as the perſon complaining) inſtead of that of the nominal plaintiff, judgment ſigned againſt the caſual ejector under the idea that the plea was null and void was ſet aſide, with coſts, as irregular. *Ibid.*

A new defendant in ejectment may give a rule to reply and *non-pros.* the plaintiff, who being nominal, he can have no coſts. 2 Bl. R. 763.

If the plaintiff after iſſue and before trial enters into part of the premiſſes, the defendant at the aſſizes may plead it as a plea *puis darrien continuance:* nor is it in the diſcretion of the Judge to reject it or not; but he is bound to receive it, it is made part of the record, and the trial is ſtopped, for the plaintiff cannot reply to it at the aſſizes. 2 Sell. Pract. 192. 3 T. R. 554.

The death of the plaintiff in ejectment ſhall not abate the action; eſpecially if another perſon of the ſame name reſide on the lands; for the Court will take notice that it is the leſſor of the plaintiff that is concerned in intereſt. *Death of the Plaintiff.* 1 Mod. 252.

As the plaintiff has a right to proceed both for the poſſeſſion and the treſpaſs, the death of the leſſor, though he be only tenant for life, is no abatement; nor can it be pleaded *puis darrien continuance*, becauſe the right is ſuppoſed in the leſſee: and though the poſſeſſion cannot be obtained, yet the plaintiff has a right to proceed for damages and coſts; all that the Court can do, is to oblige him to give ſecurity for coſts, when the leſſor is dead. But if in ſuch caſe the plaintiff is nonſuited for want of defendant's appearing and confeſſing, the executor of the leſſor ſhall have no coſts taxed on the common rule. 2 Sell. Pract. 193. 2 Str. 1056. 2 Sell. Pract. 193.

If one of ſeveral defendants die after iſſue joined and before verdict, the death ſhould be ſuggeſted on the roll before trial, *of Defendant* *Ibid* 363. 1 Bur.

trial, and a *venire* awarded to try the iſſues between the ſurvivors.—Yet when the *venire* was awarded againſt both, and the verdict was againſt both, upon ſuggeſting the death of the one upon the roll after verdict, the plaintiff had judgment for the whole againſt the other.

of either Party. If either party die after the commencement of the aſſizes, though before trial, it is within the ſtat. 17 *C.* 2. *c.* 28. made perpetual by 1 *J.* 2. *c.* 17. *s.* 5. whereby it is enacted, That in all actions perſonal, real or mixed, the death of either party between the verdict and judgment ſhall not be alledged for error, ſo as ſuch judgment be entered within two Terms after verdict.—If judgment be ſigned, though it be not entered on the roll within two Terms after verdict, it is ſufficient.

2 Sell. Pract. 194.

Of the Evidence.

7 T. R. 47. 8 T. R. 2, 122. 4 Bur. 2487. In this action the legal title muſt prevail, nor is there any difference in this reſpect between the caſe of an ejectment brought by a truſtee againſt his *ceſtui que truſt* and any other perſon: the plaintiff cannot recover, but upon the ſtrength of his own title; he cannot found his claim upon the weakneſs of the defendant's title, for poſſeſſion gives the defendant a right againſt every man who cannot ſhew a good title. Therefore though the defendant have no title in himſelf, if he prove a title out of the leſſor, it will be ſufficient.

Bull. N. P. 110.

4 T. R. 682. Thus, in ejectment by landlord againſt tenant whoſe leaſe is expired, the latter is not barred from ſhewing that his landlord's title is extinct.

Bull. N. P. 110. But when defendant would prove a title out of the leſſor, it muſt be a ſubſiſting one; for the mere production of an antient leaſe, though for a thouſand years, will not be ſufficient, unleſs he likewiſe prove poſſeſſion under it within twenty years.

Ibid. So, if the defendant produce a mortgage deed, the intereſt upon which has not been paid and the mortgagee never entered, it will not be ſufficient to defeat the plaintiff, claiming under the mortgagor; becauſe it will be preſumed that the money was paid at the day, conſequently it is no ſubſiſting title. But if the defendant prove intereſt paid upon ſuch mortgage, after the time of redemption, and within

within twenty years, it will be ſufficient to nonſuit the plaintiff.

The true queſtion in an ejectment is who has the poſſeſſory right.

Thus, where the tenant's title accrues prior to that of the leſſor of the plaintiff, the latter cannot ſucceed in this action; and this, even though, (where he claims under an *elegit* ſubſequent to a leaſe granted to the tenant in poſſeſſion,) he give the tenant notice that he does not mean to diſturb his poſſeſſion, only wiſhing to get into the receipt of the rents and profits of the eſtate. 8 T. R. 2.

So, a ſatisfied term may be preſumed to be ſurrendered; but an unſatisfied term, raiſed for the purpoſe of ſecuring an annuity, during the life of the annuitant cannot; but it may be ſet up as a bar to the heir at law, even though he claim only ſubject to the charge. 2 T. R. 684.

It has however been reſolved by Lord *Mansfield* and many of the Judges, never to ſuffer a plaintiff in ejectment to be nonſuited by a term ſtanding out in his own truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee; but to direct the jury to preſume it ſurrendered. The rule is to be underſtood thus: that the truſt eſtate ſhall not be ſet up in an ejectment to defeat the *ceſtui que truſt* in a *clear* caſe; in ſuch caſe, where the truſt is perfectly clear and manifeſt, the rule ſtands upon ſtrong and beneficial principles, becauſe in ejectment the queſtion is, who is entitled to the poſſeſſion. But if the truſt be doubtful, a court of law will not decide upon it in an ejectment. Doug. 721. 4 T. R. 682. 7 T. R. 2. 7 T. R. 47.

So where a legal term was created for a particular purpoſe, if that purpoſe were ſatisfied, or if it were unſatisfied and not connected with the litigating parties, it ſhall never be ſet up between them in an ejectment; but ſhall be conſidered as if it had never been created.—In laying down this rule, Lord *Mansfield* obſerved, that "Where a truſt term is a mere matter of form, and the deeds mere muniments of another's eſtate, it ſhall not be ſet up againſt the real owner: it is therefore ſettled that a ſatisfied truſt ſhall be taken to be a truſt for the benefit of the heir at law. A truſt ſhall never be ſet up againſt him for whom the truſt was intended. It is a mere form of conveyance; and 1 T. R. 758. *Ibid. n. n.* 759.

and it is admitted, that where the term is in truſt for the benefit of the leſſor of the plaintiff, the defendant ſhall not ſet it up in ejectment as a bar to his recovery.

Ibid. 760. "To go a ſtep farther: third perſons may have titles, and therefore, the Court ſay, that where there is a tenant in poſſeſſion under a leaſe which is a bar to the recovery of the leſſor, he being to recover by the ſtrength of his own title, yet to prevent this from being turned improperly againſt the perſon entitled to the inheritance whoſe right is not diſputed by the tenant, if the leſſor diſpute the property only againſt another, and give notice to the tenant that he does not mean to diſturb his tenancy, the Court will never ſuffer the tenant to ſet up the leaſe as a bar to the recovery.

Ibid. "There is another diſtinction to be taken: whether ſuppoſing a title ſuperior to that of the leſſor of the plaintiff exiſts in a third perſon, who might recover the poſſeſſion againſt him, it lies in the mouth of a defendant to ſay ſo in anſwer to an ejectment brought againſt himſelf by a party having a better title than his own. I found this point ſettled before I came into this Court, that the Court never ſuffers a mortgagor to ſet up the title of a third perſon againſt his mortgagee: for he made the mortgage, and it does not lie in his mouth to ſay ſo, though ſuch third perſon might have a right to recover poſſeſſion. Nor ſhall a tenant who has paid rent, and acted as ſuch, ever ſet up a ſuperior title to a third perſon againſt his leſſor in bar of an ejectment brought by him, for the tenant derives his title from him."

Bull. N. P. 110. Conſonant to this principle, it was held that in an ejectment brought by a ſecond mortgagee againſt the mortgagor, the defendant ſhall not give in evidence the title of the firſt mortgagee in bar of the ſecond; becauſe he is barred to aver contrary to his own act that he had nothing in the land when he took upon him to convey by the ſecond mortgage.

1 T.R. 760. *in n.* Alſo, where a leſſee for years had got poſſeſſion of ſome mortgage deeds, and endeavoured to ſet up that title againſt the mortgagor; though it ſhewed that the plaintiff had no right to recover as againſt the ſecond mortgagee, yet he was permitted

permitted to recover againſt the defendant in that inſtance; and the deciſion was acquiſced under.

So, the ſurrenderor before admittance is conſidered as a truſtee for the ſurrenderee, and therefore is not permitted to ſet up a formal objection againſt the plaintiff's recovering that property which he holds for his benefit. 1 T.R. 600, 395.

So, that though as a general rule, it is true, that the plaintiff in this action muſt recover by the ſtrength of his own title, conſtant exceptions to the rule have notwithſtanding been admitted. *Ibid.*

Where ſeveral matters are neceſſary in order to eſtabliſh a complete title, the plaintiff muſt prove all thoſe requiſites.

Therefore, in an ejectment for a recovery if the plaintiff prove the taking of the tithes only, and not an entry into the glebe, he will be nonſuited. For the plaintiff ought to prove that his leſſor was admitted, inſtituted and inducted, and that he has read and ſubſcribed the thirty-nine articles, and declared his aſſent and conſent to all things contained in the book of Common Prayer. But he need not prove a title in the patron; for inſtitution and induction upon the preſentation of a ſtranger is ſufficient to bar him who has right in ejectment, and to put the rightful patron to his *quare impedit*: but preſentation ought to be proved, and inſtitution would not of itſelf be ſufficient evidence of it, though it were recited in the letters; eſpecially if induction or poſſeſſion have not followed.—Whether proof of a verbal preſentation would ſuffice, ſeems doubtful. Letch. 62. Bull. N. P. 105.

So alſo, if an ejectment be brought by the aſſignees for lands which may have come to the bankrupt after his bankruptcy, and before the allowance of the certificate, they ſhould give in evidence a ſpecial conveyance of this part. 2 Eſp. N.P. 438.

Reaſonable preſumption however, will be admitted in favour of a title. 7 T. R. 433.

Therefore where a prebendary brought this action to recover a houſe built upon his prebendal ſcite, the prebendary being called to prove the ſeveral requiſites neceſſary by the ſtat. 13 *Eliz. c.* 12, and 13 & 14 *C.* 2. *c.* 4. the Chief Juſtice ſaid, "thoſe ſhall be preſumed upon ſound principles "of law." 3 Wilſ. 366.

So,

Run.Ejeƈt. 311. So, where the leſſor claims as heir at law, as for inſtance of *A.* it is ſufficient to prove that *A.* was in poſſeſſion, and that the leſſor is his heir; for it ſhall be intended, *prima facie*, that *A.* was ſeiſed in fee, till the contrary appear: 2 T.R. 684. and, if there be an agreement before marriage, that a ſettlement ſhall be made of the wife's eſtate, reſerving to her a power to diſpoſe of it, which agreement is ſigned by the intended huſband and wife, but not ſealed, and before the marriage the wife diſpoſes of it to the huſband, who ſurvives her and deviſes the eſtate by will, the title of his deviſee is ſuch a doubtful equity as cannot be ſet up in an ejeƈtment againſt the title of the wife's heir at law.

2 Bl. R. 1228. So, where plaintiff produces an original leaſe of a long term and proves poſſeſſion for ſeventy years, the meſne aſſignments ſhall be preſumed.

Run.Ejeƈt.276. However, as to the doƈtrine of preſumption which has conſiderable weight in the ſcale of evidence, this general principle muſt be attended to; namely, that generally length of time alone is nothing; but preſumption muſt ariſe from ſome faƈts or circumſtances ariſing within that 2 Bur. 1072, 3. time: for there are two ſorts of preſumption, one a preſumption of law, not to be contradiƈted; the other a ſpecies of evidence; and there can be no preſumption of the nature of evidence in any caſe, without ſomething from whence to make it; ſome ground on which to found the preſumption.—Every preſumption may be encountered, or to ſpeak more technically, rebutted, by contrary evidence; which in the caſe of executors, is called rebutting equity; as the implied revocation of a will for example, may be rebutted by parol evidence.

1 T, R. 701. Thus, a demiſe of premiſſes in *Weſtminſter*, late in the occupation of *A.* particularly deſcribing them, part of which was a yard, does not paſs a cellar ſituate under that yard, which was then in the occupation of *B.* another tenant of the leſſor: and the leſſor in an ejeƈtment brought to recover the cellar is not eſtopped by his deed from going into evidence to ſhew that the cellar was not intended to be demiſed.

This being an aƈtion of treſpaſs, the ward or place mentioned in the declaration, is material.

1 Str 595. Thus, in ejeƈtment for a houſe in the pariſh of St. *Peter*, in

in the Ward of *Cheap*, the defendant proved it to be in the Ward of *Farringdon Within*, and that no part of the parish of St. *Peter* was in the Ward of *Cheap*, and the plaintiff was nonsuited.

But if the plaintiff declare on a lease of a certain date, though his proof do not establish the lease as declared on, yet if he prove a good and subsisting lease at the time, it will be sufficient, 2 Esp.N.P. 459.

As where the declaration was on a lease made the 14th of *January*, 30th of *Eliz.* and the evidence was a lease sealed the 13th of the same year, the evidence was held to be good; for if it was a lease sealed the 13th, it was a good lease on the 14th. 4 Leon. 14.

The rules respecting notice to quit, before a tenant at will, or more correctly speaking, a yearly tenant, can be ousted of his possession, and what will amount to a waiver of it pointedly apply to the present subject; for a tenancy must be determined before the day of the demise laid in the declaration: we refer the reader for information on these points to the seventh chapter of this work, where they occur as connected with the tenancy from year to year.

An ejectment is a possessory action, in which almost all titles to land are tried.—Whether the party's title be to an estate in fee, fee-tail, for life, or for years, the remedy is by one and the same action; and it is now almost the only remedy in practice for recovering land wrongfully with-held. 1 Bur. 90. 2 Bur. 667.

In this action therefore, titles to lands arising under wills are tried.—These for the most part are cases brought by the heir at law against the devisee, or against the person who claims to be heir at law, on the ground of bastardy; or by a devisee claiming an estate under a will.

Where one brings an ejectment as heir at law, he ought properly to make out a regular pedigree from the ancestor under whom he claims: mere report of relationship, or supposition, are not sufficient; for if such evidence were admitted, the estate might be carried contrary to the rules of descent; as for example, to the paternal, instead of the maternal line. 2 Bl. R. 1099.

In ejectments against devisees, or their heirs, the matter 2 Esp.N. P.467.

turns on the due execution of the will; on the teſtator's capacity to deviſe; or on the legality of the deviſe itſelf.

Run. Eject. 357. As this action ſometimes turns upon the queſtion of marriage, it may be obſerved, that marriages in fact may be proved either by the regiſter or a copy of it, or by *vivâ voce* evidence of the ceremony corroborated by circumſtances identifying the parties. It is not neceſſary however, to prove a marriage in fact: a reputed marriage will be ſufficient; and that may be ſubſtantiated by cohabitation, reputation, or other circumſtances, from which a marriage may be inferred; and whoever wiſhes to impeach a marriage, muſt ſhew wherein it was irregular.

4 Bur. 2058.

Ibid. 360.

Bull. N.P. 294. With reſpect to cohabitation, it is the practice to admit evidence of what the parties have been heard to ſay as to their being or not being married.

Run. Eject. 225. If the leſſor of the plaintiff claim title as guardian *in ſocage*, he may be called upon to prove that the infant is not fourteen years of age.

2 Sell. Pract. 218. 2 Cromp. Pract. 194. In ejectment of tenants of the mortgagor, he defended, and the plaintiff proved the mortgage only, which proof was held not to be ſufficient; for he ſhould have proved the lands to be in poſſeſſion of the perſons to whom the ejectments were delivered, as the defendant only admits himſelf to be landlord to them of lands in their poſſeſſion.

Bull. N. P. 104. If tenant by *elegit* be leſſor of the plaintiff, it will be neceſſary for him to prove the judgment, the *elegit* taken out upon it, and the inquiſition and return thereupon, by which the land in queſtion is aſſigned to him; and if by that it appear, that more than a moiety was extended, he cannot recover, for it would be *ipſo facto* void, and not need a judgment or *audita querela* to avoid it.

Salk. 563. 1 Ld. Raym. 718

Bull. N. P. 104. So, in ejectment by the conuſee of a ſtatute-merchant, he muſt prove a copy of the ſtatute, and of the *capias ſi lacias* returned, and the extent alſo returned, and alſo the *liberate* returned; for though by the return of the extent an intereſt is veſted in the conuſee, yet the actual poſſeſſion of the intereſt is by the *liberate*: for an extent gives only a poſſeſſion in law.

In

In ejectment for a copyhold on a forfeiture, the plaintiff ought to prove that his leſſor is lord and the defendant a copyholder, and that he committed a forfeiture; but the preſentment of the forfeiture need not be proved, nor the entry or ſeizure of the lord for the forfeiture. *Ibid.* 107.

If an ejectment be brought againſt the leſſee for years of a copyholder (relying upon the leaſe as a forfeiture) the plaintiff muſt prove an actual admittance of the copyholder; and it will not be ſufficient to prove the father admitted and that it deſcended to the defendant's leſſor as ſon and heir, and that he had paid quit rents: for a copyholder cannot make a leaſe except to try a title, before admittance and an actual entry; and therefore if after admittance he were to ſurrender without making an actual entry, the ſurrender would be void. *Ibid.*

The recital of the will in the copy of the admittance, is good evidence of the deviſe againſt the lord or any other ſtranger. But if the ſuit be between the heir of the copyholder and the deviſee, the will itſelf ought to be produced. *Ibid.* 108.

Whether copyholds are within the ſtatute againſt fraudulent conveyances, and therefore the plaintiff claiming under a voluntary conveyance ſhall prevail againſt a defendant claiming under a ſubſequent purchaſe for a valuable conſideration, is doubtful. *Ibid.* Dougl. 716 *n.* 1. Cowp. 158.

If the truſtees of a public turnpike act, which empowers them to erect toll-houſe and to mortgage, and which declares that there ſhall be no priority among the creditors, have made a mortgage of the toll-houſes and gates, which is not within their power, and an ejectment is brought againſt them by the mortgagee, they are not eſtopped by their deed from inſiſting that the Act gives them no ſuch power: for the general principle, that the party granting is eſtopped by his deed to ſay that he had no intereſt, does not apply where truſtees are acting not for their own benefit, but for that of the public, beſides the deed cannot operate in direct oppoſition of an Act of Parliament which negatives the eſtoppel; and this being a Public Act the Court are bound to take notice that the truſtees had no ſuch power. 2 T. R. 169. *Ibid* 171.

With reſpect to witneſſes, in general a witneſs muſt teſtify from his own knowledge of the fact which he is called upon Run. Eject. 253.

upon to prove; but he may aſſiſt his memory, as to the circumſtance, by *memoranda* taken at the time; yet if he does not ſpeak from any recollection which he has, but merely from ſuch *memoranda*, the original minutes muſt be produced by him at the time of examination.

Cowp. 622. 1 Str. 632. The tenant is incompetent to prove the fact of poſſeſſion; for he cannot be permitted to ſupport his own poſſeſſion, by his own teſtimony; beſides he is liable for the meſne profits.

3 T. R. 309. Run. Eject. 251. 1 T. R 4. But where a witneſs produced to prove the leaſe was objected to becauſe he had the inheritance in the land demiſed, it being anſwered that both parties claimed under the ſame perſon, he was admitted to give evidence: for under circumſtances between indifferent perſons, and where he has not any intereſt in the queſtion, the landlord is a competent witneſs to prove the terms of his own demiſe.

2 T. R. 53. Declarations by tenants are admiſſible evidence after their death, to ſhew that a certain piece of land is parcel of the eſtate which they occupied; and proof that they exerciſed acts of ownerſhip in it (not reſiſted by contrary evidence,) is deciſive.—Whether parcel or not, is always matter of evidence.

Ibid. 55. So, where the plaintiff claimed as deviſee in remainder under a will twenty-ſeven years before, under which there was no poſſeſſion, declarations by the tenant who was in poſſeſſion at that time, that he held as tenant to the deviſor, are admiſſible evidence to prove ſeiſin in the deviſor.

1 P. Wms. 287, 290. So, a grantee when he appears to be a bare truſtee is a good witneſs to prove the execution of the deed to himſelf.

Salk. 283. An heir apparent may be a witneſs concerning the title of the land, but the remainder-man cannot, for he has a preſent eſtate in the land; but the heirſhip of the heir is a mere contingency. So, tenant in-tail, remainder-in-tail, he in remainder cannot be a witneſs concerning the title of theſe lands; for he has an eſtate ſuch as it is.

1 Mod. 107. As to executors, an executor may be a witneſs in a cauſe concerning the eſtate if he have not the ſurpluſage given

Doug. 139, 141. him by the will.—It is clear therefore, that an executor in truſt may be a witneſs: and it is now held to be no objection to an executor's teſtimony, that he may be liable to actions

tions as executor *de ſon tort.* So an executor who takes not any beneficial intereſt is a competent witneſs to prove the ſanity of his teſtator.

A perſon who had ſold the inheritance without any covenant for good title or warranty was allowed to be a witneſs to prove the title of the vendee. 1 Str. 445.

Huſband and wife cannot in any [civil] caſe be admitted as witneſſes for or againſt each other; this is now conſidered as a ſettled principle of law. 4 T. R. 678. 2 T. R. 268.

A clerk of the Poſt-Office accuſtomed to inſpect franks for the detection of forgeries, may be examined as a witneſs to prove that the hand writing of an inſtrument is an imitated and not a natural hand, and alſo to prove that two writings ſuſpected to be imitated hands were written by the ſame perſon. 4 T. R. 497.

With reſpect to the objection of intereſt, which if ſubſtantiated, applies to the competency of a witneſs, if a perſon who is intereſted, execute a ſurrender or releaſe of his intereſt, he may be examined as a witneſs, although the party refuſe to accept the ſurrender, or releaſe: for every objection of intereſt proceeds on the preſumption that it may bias the mind of the witneſs; but this preſumption is taken away by proof of his having done all in his power to get rid of the intereſt. Doug. 141.

An objection to the competency of a witneſs ſhould be firſt made at the trial; for if made then, it may be ſhewn to have been releaſed, or otherwiſe done away: therefore on motion for a new trial, no objection to a witneſs can be received, which was not made at the trial. Nay, an objection to the competency of witneſſes diſcovered after trial, is not ſufficient ground, of itſelf, for granting a new trial; though it may have ſome weight, if the applicant appears to have merits: and though the objection appears to be properly made at the trial, yet in caſe of doubt, it is uſual to apply to the credit, rather than the competency of a witneſs. *Ibid.* 140. 1 T. R. 719. Run. Eject. 252. 1 Bl. R. 345.

Reſpecting the weight as evidence of a ſurvey of lands, it is laid down generally by Lord C. B. *Gilbert*, that an old terrier or ſurvey of a manor, whether eccleſiaſtical or temporal, may be given in evidence, for there are no other ways of aſcertaining the old tenures or bounds. 1 Str. 95. *in notis.*

Ibid. But this opinion ſeems to relate, with regard to terriers, to ſuch as are ſigned, not only by the parſon, but by the church-wardens and ſubſtantial inhabitants of the pariſh, or at leaſt by the church-wardens, not being of the parſon's nomination: and, in reſpect of ſurveys, to ſuch as are ſigned by the tenants of the manor, or appear to have been made at a court of ſurvey. For then, being of a public nature, they cannot be ſuppoſed to have been framed, and atteſted to ſerve the private intereſt of any individual: upon which principle alſo, court rolls, or at leaſt pariſh books are admitted in evidence, when the rights of third perſons are concerned.

Ibid. But ſurveys, although of a private nature, have been admitted in evidence where circumſtances could be adduced to ſhew the improbability of their being taken to ſerve any intereſted purpoſe in the maker.—Thus, where two manors were in the hands of the ſame perſon, and a ſurvey was taken, and afterwards one of them was conveyed to another perſon, and after a long time there were diſputes between the lords of the two manors, this old ſurvey was held to be evidence. So, an old map of lands was allowed to be evidence; as when it came along with the writings and agreed with the boundaries adjuſted in an antient purchaſe.

Ibid. But where a terrier or ſurvey is not attended with ſuch circumſtances, and is the mere private memorial of the party for whom it is made, it ſeems only admiſſible as evidence againſt him.

7 T. R. 117. Where a landlord has a right to enter for non-payment of rent, he cannot recover in ejectment at common-law, unleſs he demand the rent on the day on which it became due: nor under the ſtatute 4 *G.* 2. if ſufficient diſtreſs be on the premiſſes.

4 T. R. 497. The defendant in ejectment is entitled to the general reply, where the plaintiff claiming by deſcent, proves his pedigree and ſtops, and the defendant ſets up a new caſe in his defence, which is anſwered by evidence on the part of the plaintiff.

Of the Verdict. Bull. N. P. 106. With reſpect to the verdict, the plaintiff ſhall recover according to the title that he makes out, though not conſiſtent with

with that ſtated in the declaration; for the true queſtion in an ejectment is, who has the poſſeſſory right.

Therefore, where the plaintiff declared on a demiſe for ſeven years, but had title to five only, he recovered according to his title notwithſtanding. *Ibid.* 3 T. R. 13.

So, the plaintiff may recover as many acres as he proves title to, though he declare for more: and though the declaration goes for ſeveral things, and there is a general verdict; though the declaration be bad as to part, yet the plaintiff may recover for the remainder. 2 Eſp. N.P. 490. 1 Bur. 330.

As, where ejectment was "for one meſſuage or tenement "and four acres of land to the ſame belonging;" the words "to the ſame belonging," were held to be void; for land cannot properly belong to a houſe, and then it is as a declaration of a meſſuage or tenement, and four acres of land; which though it be void for the firſt, it is good for the land: whereupon the plaintiff releaſed the damages and for the four acres had judgment. Cro. Eliz. 186.

In a recovery in ejectment of one hundred acres of land, twenty of paſture, &c. without mention of any houſe or garden, it was nevertheleſs held that the plaintiff ſhould recover all the erections thereon. Dyer, 47. a.

The maxim however that *cujus eſt ſolum, ejus eſt uſque ad cælum et ad inferos*, does not apply in every caſe: for it has been adjudged, that a demiſe of premiſſes in *Weſtminſter*, late in the occupation of *A.* particularly deſcribing them, part of which was a yard, did not paſs a cellar ſituate under that yard which was then in the occupation of *B.* another tenant of the leſſor. 1 T. R. 701. *ante* p. 384.

A verdict cures a defect in ſetting out the title, though it cannot cure a defective title. 3 Will. 275.

After verdict, if the objection be grounded upon the mere miſtake of the clerk or a trifling nicety, there is no need of any actual amendment at all, the Court will overlook the exception. *Ibid.*

This diſtinction therefore muſt be attended to: if there be only evidence at the trial upon ſuch of the counts as are good and conſiſtent, a general verdict may be altered by the notes of the Judge, and entered only on thoſe counts; but if there be any evidence applicable to the other bad or in- Run. Eject. 235.

conſiſtent counts, the *poſtea* cannot be amended: the only remedy then is by a *venire de nove*.

Of the Judgment.

1 Bur. 114. The judgment in ejectment is a recovery of the poſſeſſion, (not of the ſeiſin or freehold) without prejudice to the right as it may afterwards appear, even between the parties. He who enters under it, in truth and ſubſtance can only be poſſeſſed according to right, *prout lex poſtulat.* If he has a freehold, he is in as a freeholder. If he has a chattel intereſt, he is in as a termor; and in reſpect of the freehold, his poſſeſſion enures according to right. If he has no title, he is in as a treſpaſſer; and without any re-entry by the true owner, is liable to account for the profits.

Ibid. 366, 326. Where the plaintiff declares for the whole of certain premiſſes of which he recovered a moiety only, the judgment ſhould not be for a moiety only, but that the plaintiff recover his term; and he muſt take out execution for no more than he has a right to recover.

Run. Eject. 402. The judgment is either againſt the caſual ejector, or againſt the tenant, upon a verdict; the former is generally before, the latter always after, an appearance.

1 Str. 531. The caſual ejector can in no caſe confeſs a verdict.

Run. Eject. 403. If judgment be regularly ſigned, but without loſs of trial, it may be ſet aſide on payment of coſts, and taking notice of trial.

When the landlord is admitted defendant inſtead of the tenant, the judgment is entered againſt the caſual ejector, with a ſtay of execution till further order: if the landlord be afterwards nonſuited for not confeſſing leaſe, *&c.* or if a verdict be given againſt him upon the trial, the plaintiff muſt move for leave to take out execution againſt the caſual ejector; and the day of ſhewing cauſe againſt the motion is the proper time for the landlord to make his ſtand againſt the plaintiff's taking out execution and getting into poſſeſſion. It has however been held, that he may bring a writ of error, which would be a ſufficient reaſon againſt taking out execution.

2 Bur. 757.

2 Str. 1241.

The plaintiff cannot have judgment againſt the caſual ejector, till common bail is filed.

2 T. R. 779. When the plaintiff is nonſuited at the trial for want of the defendant's confeſſing leaſe, *&c.* he is not entitled to ſign judgment

judgment againſt the caſual ejector, till the *poſtea* comes in on the day in bank.

The damages in ejectment are merely nominal, the recovery of the term being the object of the action. *Of the Damages.*

Where an action of ejectment and an action of aſſault and battery were joined in the ſame writ, after verdict it was moved in arreſt of judgment: becauſe the battery was joined with the ejectment, and the damages being entire, the plaintiff could not releaſe the damages in the battery, to take judgment, and execution in ejectment. The reaſon is, that where the damages are entire, it does not appear that the plaintiff recovered by any title in ejectment; and therefore it cannot be ſeen by the Court, whether thoſe two actions were not originally joined, that the plaintiff might have a recovery in one, to ſave his coſts in the other. But where the damages are given ſeverally, it appears that the plaintiff had a title in both caſes; and therefore if he releaſe his damages in battery, which was misjoined with the ejectment, there is no reaſon why he ſhould not take his judgment in ejectment: for though the Court muſt judge the joinder of the action to be bad, where it appears to be a contrivance to ſave coſts, which is the miſchief of joining different actions; yet where there appears to be good cauſe in both caſes, the joinder of the action is cured by the releaſe, for the plaintiff ſhould have judgment according to his right. Run. Eject. 144.

Incident to the judgment are the coſts, or expences of the action, which are therefore, as next in order, to be treated of. *Of the Costs.*

If the tenant do not appear, and judgment be conſequently entered againſt the caſual ejector, the plaintiff has no other remedy for his coſts, than by his action for the meſne profits; in which they are recoverable againſt the tenant, as conſequential damages. Run. Eject. 414.

But if the tenant appear, and be made defendant, under the uſual terms of confeſſing leaſe, *&c.* and afterwards, at the trial, refuſes to make that confeſſion, he is liable, upon the rule by which he was made defendant, to the payment of coſts; which if not paid, an attachment lies againſt him: and this is all the remedy which the plaintiff has for *Ibid* 415.

his

his coſts, if he be nonſuited by the defendant not confeſſing leaſe, *&c.* If the tenant appear, confeſs leaſe, *&c.* and a verdict be given againſt him upon the trial, the judgment is entered againſt the tenant; on which judgment the plaintiff may take out execution, as in ordinary caſes: for this is not a caſe provided for by the rule.

Ibid. 416. Where a verdict is given for the defendant, or the plaintiff be nonſuited for any other cauſe than that of not confeſſing leaſe, *&c.* the defendant muſt tax his coſts on the *poſtea*, as in other actions; and ſue out a *capias ad ſatisfaciendum* for the ſame againſt the plaintiff, which he muſt ſhew, under ſeal, to the plaintiff's leſſor, and at the ſame time ſerve him with a copy of the conſent rule; then if the leſſor, being required, refuſe to pay the coſts, the Court, on motion, will grant an attachment againſt him.

6 Mod. 309. Though the plaintiff in ejectment be but nominal, yet if he be not found, or be not able to pay the coſts, the attorney is liable, and may be committed until he pay them, or produce a ſufficient plaintiff.

Run. Ejec. 417. So, if a ſtranger carry on a ſuit in another's name, who has title, and yet is ſo poor that he cannot pay the coſts; in caſe he fail, the Court, on affidavit of the circumſtances, will order the perſon who carried on the ſuit to pay coſts to the defendant.

So, where baron and feme were leſſors, and the baron died after entering into the rule, the feme was notwithſtanding held liable to the payment of coſts; becauſe they were to be paid by the leſſors of the plaintiff, and both of them were in the leaſe.

If the plaintiff has a verdict in ejectment, and coſts are taxed, and an attachment iſſues for non-payment of them, the defendant ſhall not have an ejectment againſt the plaintiff, in the ſame Court, till he has paid thoſe coſts: and the Courts conſider an ejectment in another, in the ſame light as a former ejectment in the ſame Court; and will ſtay proceedings in a new ejectment till the coſts of the former be paid, as well where the former ejectment was in another, as where it was in the ſame Court.

2 Bl. R. 1158. Proceedings in ejectment were ſtayed by the Court of Common Pleas, after a long delay, the day before trial, till

till the coſts of a former ejectment in the King's Bench were paid.

So, proceedings were ſtayed in an ejectment by a fraudulent aſſignee of an inſolvent debtor, till the coſts of former ejectments brought by the debtor himſelf were paid. *Ibid.* 1181.

So, proceedings were ſtayed even till the coſts were paid of a former ejectment, in which the leſſor of the plaintiff never entered into the conſent rule. *Ib d.* 904.

Yet where a verdict in a former ejectment had been for the plaintiff, who, upon the defendant bringing the action againſt him, prayed for coſts before he ſhould be compelled to plead to the new action, it was denied, becauſe the verdict being for him, he had no vexation: but if it had been againſt him, or he had been nonſuited, he ſhould not have brought another action before the coſts of the firſt had been paid, becauſe it was a vexation to bring a new action.— No new ejectment, however, can be brought by the defendant after a recovery againſt him, till he has quitted the poſſeſſion, or the tenant have attorned to the plaintiff. 4 Mod. 379. Salk. 258. Run. Eject. 420.

Where the leſſor of the plaintiff was in cuſtody under an attachment for non-payment of coſts in a former ejectment, and brought a new ejectment upon the ſame demiſe, the Court refuſed to ſtay proceedings therein, till the coſts of the former ſhould be paid. *Ibid.*

In ejectment againſt ſeveral, the plaintiff has his election to pay coſts to which of the defendants he pleaſes. 1 Str. 516.

By ſtat. 8 & 9 *W.* 3. *c.* 11. in ejectment againſt ſeveral, if any one or more is acquitted by verdict, he ſhall recover his coſts againſt the plaintiff, unleſs the Judge ſhall certify in open Court that there was good cauſe for making ſuch perſon a defendant.

This being an action of treſpaſs, if the Judge before whom it is tried ſhall certify under his hand on the back of the record, that the freehold or title of the land came chiefly in queſtion, though the damages are under 40*s.* there ſhall be the full coſts. This is enacted by ſtats. 43 *Eliz.* *c.* 6. 21 *J.* 1. *c.* 16. 22 & 23 *C.* 2. *c.* 9. *s.* 136.

Touching the execution of the judgment, as the plaintiff in ejectment recovers only the poſſeſſion of the property in queſtion, execution of courſe is of the poſſeſſion only. *Of the Execution.* Run. Eject. 424. 1 Bur. 90. 339.

The

2 Sell. Pract. 202. The plaintiff having judgment to recover his term, may enter without ſuing out a writ of execution, which is called an *habere facias poſſeſſionem*; for where the land recovered is certain, the recoverer may enter at his own peril, and the aſſiſtance of the ſheriff is only to preſerve the peace.

Ibid. The uſual and regular way however is to make out a writ of *habere facias poſſeſſionem*, which being engroſſed, ſigned, and ſealed, and a *præcipe* being made out for it, is carried to the office of the ſheriff, who makes out a warrant thereon, and will put the leſſor of the plaintiff in poſſeſſion. It has 4 Bur. 1970. relation to the *teſte*; therefore if teſted the laſt day of the preceding Term, may be ſued out though the leſſor of the plaintiff be ſince dead.

Run. Eject. 432. 1 Bur. 366. *Ibid.* 629. 5 Bur. 2673. The plaintiff muſt take care not to take out execution for more than he had right to recover: and in order that the ſheriff may not be under any difficulty in executing the writ of poſſeſſion, the practice *now* is, for the plaintiff himſelf not merely to point out to the ſheriff, that of which he is to deliver him poſſeſſion, in execution of the writ, but to take poſſeſſion at his peril of that only to which he has title; for ſhould he take more than he has recovered and ſhewn title to, the Court will, in a ſummary way, ſet it right.

3 Will. 49. Therefore, where the plaintiff in ejectment, as tenant in common, recovered poſſeſſion of five-eighths of a cottage, with the appurtenances, and a writ of poſſeſſion was executed by the ſheriff, who turned the tenant out of poſſeſſion of the whole and locked up the door, as appeared by affidavit. *Curia.*—This is wrong; the writ ought to have purſued the verdict. Let there be a rule upon the ſheriff, and the leſſor of the plaintiff to reſtore the tenant to the poſſeſſion of three-eighth parts of the premiſſes; otherwiſe he would be forced to bring another ejectment for the ſame.

2 Sell. Pract. 203. 2 Roll. Abr. 886. If there are ſeveral meſſuages in poſſeſſion of different tenants, the ſheriff muſt go to all their houſes and turn them out: the delivery of the poſſeſſion of one tenement in the name of all, is not ſufficient.

5 Co. 91. *b.* The words of the writ being *quod habere facias poſſeſſionem*, there muſt be a full and actual poſſeſſion given by the ſheriff, and conſequently all power neceſſary for this end

muſt be given him: if therefore the recovery be of a houſe, the ſheriff may juſtify breaking open the door, if he be denied entrance by the tenant, becauſe the writ cannot be otherwiſe executed.

If the officer be diſturbed in the execution of the writ, the Court will, on affidavit of the circumſtances, grant an attachment againſt the party whether he be the defendant or a ſtranger, for a recent ouſter is a contempt; and the proceſs is not underſtood to be executed completely, till the ſheriff and his officers are gone, and the plaintiff left in quiet poſſeſſion. 6 Mod. 27. Salk. 322.

If therefore the ſheriff turns out all perſons he can find in the houſe, and gives the plaintiff, as he thinks, quiet poſſeſſion, and after the ſheriff is gone, ſome perſons appear to be lurking in the houſe, that is no good execution, and the plaintiff, it is ſaid, ſhall have a new *habere facias poſſeſſionem*.—The new writ cannot iſſue, until the return of the firſt be expired. Leon. 145. Run. Eject. 435.

An attachment was granted abſolute in the firſt inſtance, againſt the tenant in poſſeſſion, on affidavit that he had been ſerved with a rule of Court made abſolute for delivering up the poſſeſſion, and had refuſed ſo to do. 2 Bl. R. 892.

The law ſeems, however, to make a difference where, after poſſeſſion given either on the *habere facias*, or by agreement of the parties, the plaintiff is turned out of poſſeſſion by the defendant, and where by a ſtranger. When it is done by the defendant himſelf, the plaintiff may have either a new *habere facias*, or an attachment, becauſe the defendant ſhall never, by his own act, keep the poſſeſſion which the plaintiff has recovered from him by due courſe of law. But where a ſtranger turns the plaintiff out of poſſeſſion, after execution fully executed, the plaintiff is put to his new action; or to an indictment for the forcible entry, by which means the force will be puniſhed.—The reaſon is, that the title was never tried between the plaintiff and the ſtranger, who poſſibly may claim the land by a title paramount to that of the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the ſtranger from keeping that poſſeſſion to which he may have a right. Were the law otherwiſe, 1 Keb. 779. 785.

otherwiſe, the plaintiff might, by virtue of a new *habere facias*, turn out even his own tenants who come in after the execution is executed, whereas the poſſeſſion was given him only againſt the defendant in the action, and not againſt thoſe who were not parties to the ſuit.

Roll. R. 410. If the execution go to the ſheriff for twenty acres, he muſt give twenty acres, according to the common eſtimation of the country where the lands lie.

1 Bur. 366. 5 Bur. 2673. As the plaintiff, however, is to ſhew the ſheriff the premiſſes to which he has title and to take poſſeſſion rightly at his peril, ſuch a very exact deſcription is not neceſſary in this action, as in a *præcipe*. An iſſue has been directed to try whether the ſheriff had delivered poſſeſſion properly, according to the recovery.

Run. Eject. 434. At this day, the practice is, for the plaintiff to give the ſheriff ſecurity to indemnify him from the defendant, and then for the ſheriff to give execution of what the plaintiff demands.

2 Sell. Pract. 204. A judgment irregularly obtained was ſet aſide, and the poſſeſſion that had been given upon the execution ordered to be reſtored: but the leſſor of the plaintiff (who held the poſſeſſion) abſconding, the rule became ineffectual; whereupon it was moved on behalf of the late tenants, for a writ of reſtitution; which the Court awarded accordingly.

2 Ld. Raym. 806. Salk. 258. *ſ. c.* 6 Mod. 288. 2 Sell. Pract. 204. If the plaintiff neglect to ſue out his writ of poſſeſſion for a year and a day after judgment, he muſt revive the judgment by *ſcire facias*, as in other caſes, elſe the Court will award a reſtitution *quare erronicè emanavit:* unleſs the ſtay of execution be by conſent of the parties for the year, not for leſs time, *com. ſem.* or the defendant brings error and is afterwards nonſuited.

1 Str 301. Salk. 322. 6 Mod. 288. But if the delay be by injunction of the Court of Chancery, there muſt be a *ſcire facias*; for an injunction not being a matter of record, a Court of law will not take notice of it; unleſs the party has taken out execution within the year, and continued it down by *vicecomes non miſit breve*, which may be done without a breach.

Run. Eject 429. If the plaintiff die within a year and a day, his executors cannot take out execution without a *ſcire facias*, for they are not parties to the judgment; though if execution has been

been regularly ſued out in the life-time of the teſtator, the ſheriff may execute it after his death; becauſe the authority is from the Court, and not from the party.

If after judgment and before execution, the defendant in ejectment dies, and a *ſcire facias* goes, it muſt be againſt the terre-tenants of the land (and the heir may come in as terre-tenant,) and not againſt the executor, without naming him terre-tenant. 2 Sell. Pract. 204. Cro. Car. 295. 312.

Of the Writ of Error.

By the conſent rule, as has been before obſerved, the defendant undertakes to appear and receive a declaration: the neceſſity, therefore, of an original writ, if the proceedings are in the Common Pleas, is ſuperſeded; becauſe as the tenant is to appear and receive a declaration, he cannot take advantage of the want of an original, unleſs in a writ of error: but when a writ of error is brought, the plaintiff muſt file an original, unleſs it be after verdict, when it is helped by ſtat. 38 *Eliz. c.* 14. Run. Eject. 204.

As in the Common Pleas there is no need of an original, (which alſo is the caſe in the King's Bench when the proceedings are by original,) ſo in the King's Bench, when the proceedings are by bill, there is no neceſſity for a *latitat*, or bill of ejectment: but the party muſt file bail before he can proceed. He muſt alſo file a bill of ejectment beſides the plea roll, in caſe a writ of error be brought, before errors are aſſigned. The reaſon is, that the Court has no authority to proceed in ejectment by bill, unleſs the defendant be in cuſtody; therefore, by the rule, bail is ordered to be filed, that the Court may have authority to proceed. *Ibid.*

The caſual ejector cannot bring error, being a mere nominal perſon; that writ therefore can only be brought after the defendant has appeared, and confeſſed leaſe, entry, and ouſter. 2 Sell. Pract. 205. 2 Bur. 757.

So, if the landlord be permitted to defend, a writ of error cannot iſſue in the name of the caſual ejector. *Ibid.*

But on a writ of error from an inferior Court, in the name of the caſual ejector, the Court will not order a *non pros.* to be entered, though his releaſe of errors be ſhewn; Run. Eject. 421.

becauſe

becauſe inferior Courts are not competent to proceed, as before obſerved, by a rule confeſſing leaſe, *&c.*

Ibid. So, if an infant be tenant in poſſeſſion, and judgment be againſt the caſual ejector; becauſe no laches is imputable to an infant.

3 Bur. 1823. The plaintiff having brought a writ of error in Parliament, the Court obliged him to enter into a rule not to commit waſte or deſtruction during the pendency of the writ. The defendant did not oppoſe it; and alſo juſtified (to 400*l.*)

By ſtat. 16 & 17 *C.* 2. *c.* 8. *s.* 7. it is enacted, That no execution ſhall be ſtayed by writ of error upon any judgment after verdict in ejectment, unleſs the plaintiff in error ſhall become bound in a reaſonable ſum to pay the plaintiff in ejectment all ſuch coſts, damages, and ſums of money, as ſhall be awarded to ſuch plaintiff upon judgment being affirmed, or on a nonſuit, or diſcontinuance had; and in caſe of affirmance, diſcontinuance, or nonſuit, the Court may iſſue a writ to enquire as well of the meſne profits, as of the damages by any waſte committed after the firſt judgment, and are therefore to give judgment, and award execution for the ſame, and alſo for coſts of ſuit.

This "reaſonable ſum" is generally double the rent.

Under this ſtatute the defendant is intitled by law to his writ of error, if he offers to become bound as the ſtatute directs.

4 Bur. 2501. Therefore, where the leſſor of the plaintiff ſwore that the defendant was inſolvent, and alſo that he, the leſſor, had a mortgage upon the land to more than it was worth, yet the Court held that the defendant was entitled to his writ of error, he becoming bound in double the rent.

Hob. 5. Nothing ſhall be aſſigned for error that will make it neceſſary to go again into the title of the premiſſes.

Of the Action of Ejectment where the Poſſeſſion is vacant:—Where a Corporation is Leſſor of the Plaintiff:—and Where the Action is commenced in an inferior Court.

As the old method of proceeding in this action, by ſealing a leaſe on the premiſſes, muſt ſtill be reſorted to in theſe caſes, we have thought proper to notice them as a detached article.

If the premiſſes, the poſſeſſion of which the plaintiff ſeeks to recover, be empty, no declaration of courſe can be delivered or affidavit made of the delivery of it, and conſequently the Court cannot proceed to give judgment againſt the caſual ejector.—In ſuch caſe therefore the old way of proceeding muſt be ſtill purſued, except in the ſingle inſtance of landlord and tenant, provided for by ſtat. 4 *G.* 2. of which hereafter. Run. Eject. 148. 2 Sell. Pract. 213.

This is done by entering on the premiſſes, and actually ſealing a leaſe thereon, either in perſon or by attorney.

If the former method is preferred, the proceeding is thus: *Ibid.*

A. (the perſon claiming title,) muſt go upon the land before the eſſoin day of the Term, and there ſeal and deliver a leaſe to *B.* (any friend of his, as tenant;) and at the ſame time deliver him poſſeſſion. This being done, get *C.* (any other friend) to go upon the premiſſes, and turn out *B.* the tenant, by thruſting him off the premiſſes, and whilſt he continues there ſerve him with a declaration in ejectment, in which make *B.* the tenant the plaintiff, *A.* (the perſon claiming title) the leſſor, and *C.* (the actual ejector) the defendant, and declare on the demiſe in the leaſe and ſubſcribe a notice to appear.

The declaration is the ſame as uſual, only the real perſons are made parties, inſtead of fictitious names. *Ibid.* 214.

In order to get judgment in the Court of King's Bench, an affidavit muſt be made of ſealing the leaſe, and of the ouſter by defendant, and of all the facts. This is indorſed to move for judgment againſt the caſual ejector, and unleſs defendant appear and enter into the common rule, judgment may be ſigned as on a common ejectment.—In the Common Pleas, there is no need of any affidavit, nor any motion for judgment, but on the firſt day of Term, give a rule to plead as in common actions, and if no appearance and plea, at the expiration of the rule, ſign judgment. *Ibid.*

If the landlord, or perſon claiming title, does not wiſh to enter himſelf and ſeal the leaſe, he may do it by attorney, and the proceedings are juſt the ſame; the attorney acting as the principal landlord. *Ibid.*

To warrant the above proceedings, the premiſſes muſt be vacant; they muſt be wholly deſerted by the tenant, and

the leſſor of the plaintiff not be able to find out where the tenant is to ſerve him with an ejectment.

2 Str. 1064. Therefore, where the leſſee of a public houſe took another and removed his goods and family, but left beer in the cellar: and rent being in arrear, the landlord ſealed a leaſe as on a vacant poſſeſſion, delivered an ejectment, and ſigned judgment, which was ſet aſide, the leſſee ſtill continuing in poſſeſſion; and a caſe was mentioned, where leaving hay in a barn at *Hendon* was held to be keeping poſſeſſion. It further appeared in this caſe, that the attorney for the plaintiff knew whither the leſſee removed, and might have ſerved him perſonally, which could not be done upon the premiſſes.—So in the caſe of a renting ground, to which there is no houſe or barn, if it be known where the tenant lives, he muſt be ſerved.

Bull. N. P. 95. In caſes of a vacant poſſeſſion, no perſon claiming title will be let in by the Courts to defend, but he that can firſt ſeal a leaſe on the premiſſes muſt obtain poſſeſſion. The perſon therefore claiming title muſt reſort to his new ejectment.

Imp. Pract. K. B. 537. 2 Sell. Pract. 217. But it is ſaid that any perſon claiming title to the premiſſes, and who is uſually admitted by the Court, may with leaſe appear and enter into the common rule upon motion made for that purpoſe. But *quære* now?

Ejectment by a Corporation. When a corporation is leſſor of the plaintiff, they ſhould regularly execute a letter of attorney authorizing ſome perſon to enter and ſeal a leaſe on the land: and a corporation cannot make an attorney or bailiff but by deed, nor appear but by making a proper perſon their attorney by deed.

Run. Eject. 150. As to whether the leaſe on which they declare need be by deed, it ſeems immaterial: for where the declaration ſtated the leaſe to have been made to the plaintiff under the common ſeal of the corporation, it was objected that the leaſe ought to be proved; but the objection was over-ruled by Lord *Kenyon*, who obſerved that, by the common rule and appearance, the leaſe was admitted to be as ſtated.

Ibid. If a corporation be aggregate of many, they may ſet forth the demiſe in the declaration without mentioning the Chriſtian names of thoſe who compoſe it; but if the corporation be ſole, the name of baptiſm muſt be inſerted; as if the demiſe be by a biſhop.

Where

Where the proceedings are in an inferior Court, the plaintiff muſt proceed by actually ſealing a leaſe on the premiſſes, and the defendant tries the title in the name of the caſual ejector, to ſave expence: for inferior Courts are not competent to make rules to confeſs leaſe, entry and ouſter, and if they were, have no power to enforce obedience to them. It ſeems, therefore, that if the defendant in an inferior Court enter into a rule to confeſs leaſe, *&c.* and the cauſe be removed by *habeas corpus*, and the Judge of the inferior Court grant an attachment againſt the defendant for diſobedience to the rule, the ſuperior Court will grant an attachment againſt the Judge for exceeding his authority and obſtructing the courſe of the ſuperior Court. *Proceedings in an inferior Court.* Run. Eject. 151, 152.

If an *habeas corpus* be brought to remove a cauſe in ejectment out of an inferior Court, the lands lying within their juriſdiction, and the leſſor of the plaintiff ſeal a leaſe on the premiſſes, the Courts above will grant a *procedendo*; becauſe the title to the land is local, and therefore properly within the juriſdiction of the Court below, where, if it proceed regularly, it will not be prohibited: but if the leſſor has not ſealed a leaſe on the premiſſes, the Courts above will not grant a *procedendo*. *Ibid.* 151.

So, if an ejectment be commenced in an inferior Court, and an *habeas corpus* be brought to remove it, and the plaintiff in ejectment declares againſt the caſual ejector; there may be a rule to confeſs leaſe, *&c.* as if he had originally declared in the Court above, and the Court will not grant a *procedendo*. *Ibid.*

If the lands lie partly within the cinque ports, and partly without, the defendant cannot plead the juriſdiction of the cinque ports, above; for though the land be local, yet the demiſe is tranſitory, and triable any where: and therefore though the plaintiff may lay his action for that which lies within an inferior juriſdiction in the Court below, if he take proper meaſures for the purpoſe, yet if he will proceed in a ſuperior Court, as the demiſe is tranſitory, the defendant cannot ſtop his proceeding, becauſe thoſe Courts have competent juriſdiction. *Ibid.* 152.

Section III. *Of the Action for Meſne Profits.*

An ejectment being a feigned action, brought againſt a nominal Run. Ject. 438.

nominal defendant, and generally on a ſuppoſed ouſter, is not a proper action for meſne profits, the action for which is wholly dependant upon facts, being brought againſt the real tenant, for profits which he has actually received. In the one caſe, therefore, the damages are merely nominal: in the other, they are ſuch as the plaintiff has ſuſtained by a real injury; and the fiction in the former, does not, in any manner, affect the latter: the verdict in ejectment having in fact eſtabliſhed the right of the plaintiff from the time that his title accrued, the defendant is a treſpaſſer, and the plaintiff is entitled to recover from him damages for his unjuſt poſſeſſion, equal to the value of the lands during that time; though this point is not ſettled, but the *quantum* depends upon circumſtances.

3 Bl. Com. 205.

Run. Eject. 438.

This action, therefore, reſults from the recovery in ejectment: it is an action of treſpaſs *vi et armis*, brought by the leſſor of the plaintiff, in his own name, or in the name of the nominal leſſee (for it may be brought in that of either) againſt the tenant in poſſeſſion, to recover the value of profits unjuſtly received by the latter, in conſequence of the ouſter complained of in the ejectment.—It is uſually brought by the leſſor of the plaintiff in his own name, and in that caſe, on proving a good title in himſelf and an actual ouſter and perception of profits by the defendant antecedent to the demiſe and ouſter in ejectment, he will recover damages for thoſe profits: they are ſeldom, however, an object of litigation, as the demiſe and ouſter are generally laid ſoon after the time when the leſſor's title accrued.

Ibid. 439. Bull. N. P. 89.

If the action be brought in the name of the nominal plaintiff, the Court, on application, will ſtay the ſuit till ſecurity be given for anſwering the coſts; but will not permit ſuch a plaintiff to releaſe the action; his releaſe therefore has been ſet aſide as a contempt of Court: and there is no diſtinction between a judgment in ejectment upon a verdict, or by default; for in the one caſe, the right of the plaintiff is tried and determined againſt the defendant, and in the other it is confeſſed.

8 Wilſ. 121.

Touching the *quantum* of damages given by the jury in this action, they are not bound by the amount of the rent, but may give *extra* damages; indeed four times the value of

of the meſne profits have been known to be given in this ſort of action of treſpaſs: and after judgment, by default, the coſts in ejectment being recoverable are uſually declared for as damages in this action for meſne profits. Bull. N. P. 88.

The plaintiff can recover no farther coſts in this action than were taxed in the ejectment, if it were regularly defended: but it is otherwiſe if judgment was againſt the caſual ejector. 1 Eſp. R. 358.

In treſpaſs againſt the tenant in poſſeſſion for meſne profits, either by the leſſor or the nominal plaintiff, after recovery in ejectment the plaintiff need not prove a title; but it is ſufficient to produce the judgment in ejectment and the writ of poſſeſſion executed, and to prove the value of the profits, and thereupon he ſhall recover from the time of the demiſe laid in the declaration. Bull. N. P. 87. 3 Wilſ. 121. 1 T. R. 387.

But the plaintiff is not bound to claim the meſne profits, only from the time of the demiſe; for if he prove his title to have accrued before that time, and proves the defendant to have been longer in poſſeſſion, he ſhall recover antecedent profits. Bull. N. P. 87.

In ſuch caſe, however, the defendant will be at liberty to controvert the title, which he cannot do in caſe the plaintiff do not go for more time than is contained in the demiſe; becauſe being tenant in poſſeſſion he muſt have been ſerved with the declaration, and therefore the record is againſt him concluſive evidence of the title; but againſt a precedent occupier the record is no evidence, and therefore againſt ſuch an one it is neceſſary for the plaintiff to prove his title, and alſo to prove an actual entry, for treſpaſs being a poſſeſſory action, cannot be maintained without it. *Ibid.*

Yet as to actual entry, it may admit of doubt what proof is ſufficient.—It has been ſaid that the plaintiff is entitled to recover the meſne profits only from the time he can prove himſelf to have been in poſſeſſion, and that therefore if a man make his will and die, the deviſee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title accrued, ſo as to entitle him to recover the meſne profits from that time; and they ſay, that if the law were not ſo, the Courts would *Ibid.* 5 Mod. 384.

never have ſuffered plaintiffs in ejectments to lay their demiſes back in the manner they now do, and by that means entitle themſelves to recover profits, to which he would not otherwiſe be entitled: beſide, the Court will intend every thing poſſible againſt the defendant.

3 Wilſ. 121.

Bull. N. P. 88. Suppoſing, however, that a ſubſequent entry has relation to the time that the plaintiff's title accrued, yet certainly the defendant may plead the ſtatute of limitations, and by that means protect himſelf from all but the laſt ſix years.

2 Str. 960. So, if the judgment has been againſt the caſual ejector, and no writ of poſſeſſion executed, the defendant in poſſeſſion may controvert the title, if he has not been made a defendant in the ejectment and had a verdict againſt him, and therefore the recovery in ejectment is not againſt him concluſive evidence.

3 Wilſ. 121. If one tenant in common recover in ejectment againſt the other, he may maintain treſpaſs for the meſne profits.

Girdleſtone *v.* Porter, K. B. M. T. 39 G. 3. MSS. Any one in poſſeſſion of the premiſſes after a recovery of them by action of ejectment is a treſpaſſer and as ſuch liable to damages, and he cannot cover himſelf under the licence of the defendant in ejectment, for no man can licence another to do an illegal act. In this caſe, *Sellon*, Serj. moved for a new trial. It appeared that the plaintiff by an action of ejectment had evicted one *Mitchel*, (who had been a tenant of his under an agreement for a leaſe) and had ſince brought an action againſt the preſent defendant, in which he had declared firſt in treſpaſs *quare clauſum fregit*, and in another count for money had and received, being in fact for the meſne profits. *Sellon* for the preſent defendant contended, that his client being in poſſeſſion merely as the agent of *Mitchel*, who was in priſon, was not liable to any action of treſpaſs nor for the meſne profits, *Mitchel* himſelf being the only party to be looked to. But Lord *Kenyon* obſerved, that the plaintiff having recovered in ejectment againſt his tenant, any other party in poſſeſſion was liable to be deemed a treſpaſſer, and, that in an action of treſpaſs, damages ought to be given, though not amounting quite to the meſne profits. Rule refuſed.

2 Wilſ. 115. In treſpaſs for the meſne profits againſt the tenant in poſſeſſion after a recovery in ejectment by default againſt the

the caſual ejector, the tenant cannot pay the money into Court, for the action is for a tortious occupation from the time the tenant had notice of the title of the leſſor of the plaintiff.

The defendant in this action may be held to bail.

The declaration in this action for meſne profits muſt expreſsly ſtate the ſeveral parcels of land, *&c.* from which the profits aroſe, or the defendant may plead the common bar. 2 Cromp. Pract. 223.

This action may be brought pending a writ of error in ejectment and the plaintiff may proceed to aſcertain his damages, and ſign his judgment; but the Court will ſtay execution till the writ of error be determined. 2 Sell. Pract 216

If the defendant bring a writ of error on the verdict againſt him in ejectment, and enter into a recognizance purſuant to the ſtatute 16 & 17 *C.* 2. *c.* 8. to pay coſts, the plaintiff, on judgment in his favour on the writ of error, need not bring a *ſcire facias* or action of debt on the recognizance, but may ſue out an *elegit* or writ of enquiry, to recover the meſne profits ſince the firſt judgment in ejectment. *Ibid.*

Bankruptcy is no plea in bar to an action for meſne profits, for the damages occaſioned by the tort is uncertain. Doug. 584.

Where after a recovery in ejectment and before an action of treſpaſs for meſne profits, the defendant became a bankrupt, and the jury did not include the coſts of the ejectment in their verdict in executing a writ of enquiry in the action for meſne profits, the Court refuſed to ſet aſide the inquiſition, becauſe the plaintiff might have proved the coſts as a debt under the defendant's commiſſion of bankrupt. 2 T. R. 261.

Section IV. *Of a ſecond Action of Ejectment.*

A judgment in ejectment, it may be remembered, is a mere recovery of the poſſeſſion without prejudice to the right. It, therefore, is not final between the parties ſo as to protect either the defendant or plaintiff (if he ſucceeds) from any further ſuit; for the ſame plaintiff, if he be non-ſuited, or have a verdict againſt him, may bring another ejectment againſt the ſame defendant, or if he ſucceeds in the action and gets poſſeſſion, he is ſtill liable to an ejectment from the defendant in the former action. 2 Sell. Pract 230.

Ibid. This in one reſpect may be deemed an advantage, becauſe the parties are not concluded by one trial in caſe the real merits (from accident, partiality, want of evidence, which might be afterwards ſupplied, or the like) happened not to have been fairly tried between them; but in another reſpect, much miſchief may reſult from it, as the ſpirit of litigation is thereby kept alive.

4 Eunomus, 189. The reaſon why an action of ejectment is not or cannot be final ſeems to be this: That it is impoſſible, from the ſtructure of the record in this action, to plead a former in bar of another ejectment brought; becauſe, 1. The plaintiff and defendant are nominal and exiſt in moſt caſes on record only, and conſequently may be changed in a new action; but the identity both of plaintiff and defendant muſt be averred in pleading a former action in bar. 2. The term demiſed may be laid many different ways. It has ſometimes, indeed, been attempted in Chancery, after three or four ejectments, by a bill of peace to eſtabliſh the prevailing party's title, yet it has always been denied, for every termor may have an ejectment, and every ejectment ſuppoſes a new demiſe, and the coſts in ejectment are a recompence for the

2 Sell. Pract. 230. trouble and expence to which the poſſeſſor is put.—But where the ſuit begins in Chancery for relief touching pretended incumbrances on the title of lands, and that Court has ordered the defendant to purſue an ejectment at law, there, after one or two ejectments tried, and the right ſettled

2 Str. 404. to the ſatisfaction of the Court, the Court has ordered a perpetual injunction againſt the defendant, becauſe there the ſuit is firſt attached in that Court and never began at law; and ſuch precedent incumbrances appearing to be fraudulent, and inequitable againſt the poſſeſſion, it is within the compaſs of the Court to relieve againſt it.

2 Sell. Pract. 231. As the coſts of the ejectment are deemed the recompence as above ſtated (though in truth but a poor one) the Court will not ſuffer either the plaintiff to bring a new ejectment or the defendant to bring the ejectment againſt the ſucceſsful plaintiff, until the coſts of the former action are paid.—The Courts now conſider a former ejectment in another Court, as one in the ſame Court, and will ſtay proceedings in a ſecond till the coſts of the former are paid.

So,

So, though in such former ejectment the lessor of the plaintiff never entered into the consent rule.—So, when an ejectment was brought by a fraudulent assignee of an insolvent debtor, the former lessor being plaintiff.—So, proceeding was stayed in error and a second ejectment, the plaintiff not being able to shew that the writ of error was brought with any other view than to delay payment of costs. 2 Bl. R. 904. *Ibid.* 1180. 1 Str. 554.

The remedy to enforce the payment of costs after verdict is by attachment.—But where the lessor of the plaintiff has been taken into custody upon an attachment for costs, which is in the nature of a *capias ad satisfaciendum*, there is no reason to grant the rule to stay proceedings in another action brought by the same lessor on the same demise. 2 Sell. Pract. 232.

So, where before trial a mistake is discovered, so as to render it necessary to serve a new ejectment, the Court will not stay proceedings till the costs of the first are paid; unless the party has been vexatious, or great expence has been incurred.

But if the lessor of the plaintiff be not known, the Court will order notice to be given where he may be found.—So, if he abandons his ejectment in one Court and brings a new action in the other. 2 Str. 681. 1099. 1125. 1 T. R. 491.

Proceedings in a second ejectment were stayed till the special verdict in the former was determined. 2 Str. 1105.

When the plaintiff succeeds in an ejectment, the defendant cannot bring a new ejectment against him, until he has delivered up possession, or the tenants in possession have attorned: and, it should seem, till he has also paid the costs of the former action.

The Court will not give the plaintiff leave to discontinue after a special verdict has been had, in order to adduce fresh proof in contradiction to the verdict. 2 Bl. R. 815.

Section V. *Of the Action of Ejectment upon the Statute 11 Geo. 2. c. 28. s. 2.*

By the common law an actual entry, by the person claiming title to lands and tenements, was necessary to be made in order to support an action of ejectment; but in the case of a lease, the landlord could not enter and take the actual Paul's Landl. &c. Lawy. 149.

actual poſſeſſion until the leaſe was expired: it therefore became uſual to inſert a proviſo that in caſe the rent of the demiſed premiſes was behind and unpaid at a certain time, the leſſor ſhould have a right to re-enter. In parol demiſes however, from year to year, the landlord could not have the benefit of ſuch a proviſo; and when the right of re-entry ſubſiſted, great inconvenience frequently happened to leſſors or landlords in caſes of re-entry for non-payment of rent; by reaſon of the many niceties that attended ſuch re-entries at common law, and even when a legal re-entry was made, the landlord or leſſor was put to the expence and delay of recovering in ejectment before he could obtain the actual poſſeſſion of the demiſed premiſſes.—It is therefore enacted,

By the 4th *G.* 2. *c.* 28. *s.* 2. "That in all caſes between landlord and tenant, as often as it ſhall happen that one half year's rent ſhall be in arrear, and the landlord or leſſor to whom the ſame is due, hath right by law to re-enter for the non-payment thereof; ſuch landlord or leſſor ſhall and may, without any formal demand or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſſes; or in caſe the ſame, legally ſerved, or no tenant be in actual poſſeſſion of the premiſſes, then to affix the ſame upon the door of any demiſed meſſuage; or in caſe ſuch ejectment ſhall not be for the recovery of any meſſuage, then upon ſome notorious place of the lands, tenements, or hereditaments, comprized in ſuch declaration in ejectment, and ſuch affixing ſhall be deemed legal ſervice thereof; which ſervice or affixing ſuch declaration in ejectment ſhall ſtand in the place and ſtead of a demand and re-entry; and in caſe of judgment againſt the caſual ejector, or nonſuit, for not confeſſing a leaſe, entry and ouſter, it ſhall be made appear to the Court, where the ſaid ſuit is depending, by affidavit, or be proved upon the trial, in caſe the defendant appears, that half a year's rent was due before the ſaid declaration was ſerved; and that no ſufficient diſtreſs was to be found on the demiſed premiſſes countervailing the arrears then due, and that the leſſor or leſſors in ejectment had power to re-enter, then and in every ſuch caſe, the leſſor or leſſors in ejectment ſhall recover judgment and execution in the ſame manner

manner as if the rent in arrear had been legally demanded and a re-entry made: and in caſe the leſſee or leſſees, his, her, or their aſſignee or aſſignees, or other perſon or perſons claiming or deriving under the ſaid leaſe, ſhall permit and ſuffer judgment to be had and recovered on ſuch ejectment and execution to be executed thereon without paying the rent and arrears, together with full coſts, and without filing any bill or bills for relief in equity within ſix calendar months after ſuch execution executed; then and in ſuch caſe, ſuch leſſee or leſſees, *&c.* and all others claiming and deriving under the ſaid leaſe, ſhall be barred or foreclоſed from all relief or remedy in law or equity, other than by writ of error for reverſal of ſuch judgment in caſe the ſame ſhall be erroneous; and the ſaid landlord or leſſor ſhall from thenceforth hold the ſaid demiſed premiſſes diſcharged from ſuch leaſe: and if on ſuch ejectment verdict ſhall paſs for the defendant, or the plaintiff ſhall be nonſuited therein, except for the defendant's not confeſſing, *&c.* then in every ſuch caſe, ſuch defendant ſhall have and recover his, her, or their full coſts.

" Provided always, that nothing herein contained ſhall extend to bar the right of any mortgagee or mortgagees of ſuch leaſe, or any part thereof, who ſhall not be in poſſeſſion, ſo as ſuch mortgagee or mortgagees ſhall and do, within ſix calendar months after ſuch judgment obtained and execution executed, pay all rent in arrear, and all coſts and damages ſuſtained by ſuch leſſor, perſon, or perſons entitled to the remainder or reverſion as aforeſaid, and perform all the covenants and agreements which on the part and behalf of the firſt leſſee or leſſees, are and ought to be performed. *Proviſo as to Mortgagees.*

By ſect. 3. " In caſe the ſaid leſſee or leſſees, his, her, or their aſſignee or aſſignees, or other perſon or perſons, claiming any right, title or intereſt, in law or equity, of, in, or to the ſaid leaſe, ſhall within the time aforeſaid, file one or more bill or bills, for relief in any Court of equity, ſuch perſon or perſons ſhall not have or continue any injunction againſt the proceedings at law on ſuch ejectment, unleſs he, ſhe, or they do or ſhall within forty days next after a full perfect anſwer ſhall be held by the leſſor or leſſors of the plaintiff *Of Proceedings in Equity.*

plaintiff in such ejectment, bring into Court, and lodge with the proper officer, such sum and sums of money, as the lessor or lessors of the plaintiff in the said ejectment shall, in his, her, or their answers sworn to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit; there to remain till the hearing of the cause, or to be paid out to the lessor or landlord, on good security, subject to the decree of the Court: and in case such bill or bills shall be filed within the time aforesaid, and after execution is executed, the lessor or lessors of the plaintiff shall be accountable only for so much, and no more, as he, she, or they shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premisses, from the time of his, her, or their entering into the actual possession thereof; and if what shall be so made by the lessor or lessors of the plaintiff, happen to be less than the rent reserved on the said lease, then the said lessee or lessees, his, her, or their assignee or assignees, before he, she, or they shall be restored to his, her, or their possession or possessions, shall pay such lessor or lessors, landlord or landlords, what the money so to them paid fell short of the reserved rent, for the time such lessor or lessors of the plaintiff, landlord or landlords, held the said lands.

Sect. 4. "Provided always, that if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrear, together with the costs; then and in such case, all further proceedings in the said ejectment shall cease and be discontinued: and if such lessee or lessees, his, her, or their executors, administrators, or assigns shall, upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made to him, her, or them."

Intent of the Statute. 1 Bur. 619.

The statute relates to ejectment for non-payment of rent, only where the landlord has a right to re-enter.—The true end and professed intention of the Act of Parliament is to take

take off from the landlord the inconvenience of his continuing always liable to an uncertainty of poſſeſſion from its remaining in the power of the tenant to offer him a compenſation at any time, in order to found an application for relief in equity; and to limit and confine the tenant to ſix calendar months after execution executed for his doing this; or elſe that the landlord ſhould from thenceforth hold the demiſed premiſſes diſcharged from the leaſe.

Courts of law always lean againſt forfeitures, as Courts of equity relieve againſt them: therefore, whenever a landlord means to take advantage of any breach of covenant ſo as that it ſhould operate as a forfeiture of the leaſe, he muſt take care not to do any thing which may be deemed an acknowledgment of the tenancy, and ſo operate as a waiver of the forfeiture: as diſtraining for the rent, or bringing an action for the payment of it, ſince the forfeiture accrued; or accepting ſuch rent. So, an action for double rent on the ſame ſtatute, will be barred by an acceptance of rent. Bull. N. P. 96. Cowp. 247. Co. 64.

Therefore, where an ejectment has been brought on the ſtat. 4 *G.* 2. *c.* 28. *s.* 2. for the forfeiture of a leaſe, there being half a year's rent in arrear, and no ſufficient diſtreſs on the premiſſes; acceptance of rent afterwards by the landlord, has, it ſeems, been held a waiver of the forfeiture of the leaſe; which may well be; for it is a penalty, and by accepting the rent, the party waives the penalty. Cowp. 247.

Such acceptance of rent however muſt be with the knowledge of the forfeiture having been incurred, for otherwiſe it does not manifeſt any intention in the landlord to continue his tenant.

But though the tenant has incurred a forfeiture under the ſtatute, yet he may ſtay proceedings either by tendering the rent before ejectment is delivered, or by moving for leave to pay into Court all the rent due and coſts, any time before the writ of poſſeſſion is executed, even after judgment againſt the caſual ejector. 2 Bl. R. 746; 2 Str. 900.

Or it may be done by ſummons in vacation time. 2 Sell. Pract. 210.

Before the ſtatute, proceedings would be ſtayed on bringing the rent in arrear and coſts into Court, in an action whether of covenant or debt for rent: and it is not now confined to actions under the ſtatute. Salk. 597.

For

Bull. N. P. 97. For, in ejectment by a landlord, the tenant moved to ſtay proceedings upon payment of rent, arrears and coſts. On a rule to ſhew cauſe, it was inſiſted for the plaintiff, that the caſe was not within the Act, for that it was not an ejectment founded ſingly on the Act, but that it was brought likewiſe on a clauſe of re-entry in the leaſe for not repairing, and the leaſe was produced in Court; however the rule was made abſolute, with liberty for the plaintiff to proceed upon any other title.

2 Bl. R. 747. Where the rent was tendered before notice of the action; the proceedings will be ſet aſide for irregularity; and the landlord having given directions reſpecting the matter to his attorney, amounts to nothing.

Bar. 184. 2Sell.Pract.211. The leſſors of the plaintiff were both deviſees and executors, and in each capacity rent was due to them. The defendant moved to ſtay proceedings on payment of the rent due to the leſſors of the plaintiff as deviſees, they not being entitled to bring an ejectment as executors. There appeared to be a mutual debt due to the defendant by ſimple contract, and the defendant offered to go into the whole account, taking in both demands as deviſees and executors, having juſt allowances; which the leſſors of the plaintiff refuſed. The rule was made abſolute to ſtay proceedings on payment of the rent due to the leſſors as deviſees, and coſts.

Doug. 486. If the leaſe ſpecifies that a demand of rent ſhould be made, ejectment cannot be brought till ſuch demand be made: but without ſuch ſtipulation no demand is neceſſary; but only that ſix month's rent ſhould be in arrear, and no ſufficient diſtreſs be on the premiſſes.

Ibid: 485. Salk. 259. Bull. N.P. 102. As to the queſtion, whether an actual entry is neceſſary in order to maintain an ejectment on a clauſe of re-entry for non-payment of rent, the better opinion has been, that it is not; for that an actual entry is only neceſſary to avoid a fine, or perhaps to prevent the operation of the ſtatute of Limitations.

In moving for judgment upon a declaration in ejectment delivered, or (in caſe of no tenant) affixed on the premiſſes, according to the ſtatute, the Courts require an affidavit that half a year's rent was in arrear before declaration ſerved,

ſerved, that the leſſor of the plaintiff had a right to re-enter, that no ſufficient diſtreſs was to be found on the premiſſes countervailing the arrears of rent then due, that the premiſſes were untenanted, or that the tenant could not be legally ſerved with the declaration (as the caſe is,) and that a copy of the declaration was affixed on the moſt notorious (ſtating what) part of the premiſſes; elſe the Court will not grant a rule for judgment.—This affidavit is neceſſary only upon moving for judgment againſt the caſual ejector, or after a nonſuit at the trial for the tenant's not confeſſing leaſe, entry, and ouſter.

For, if the tenant appears, and the ejectment comes to trial, the matters averred in the above affidavit muſt be proved upon the trial. 1 Bur. 620.

Note. The affidavit is neceſſary only in proceeding under the ſtatute, but not on the common law proceeding. *Ibid.* 618.

The declaration in ejectment is prepared in the uſual way, taking care to lay the demiſe after the forfeiture accrued. 2 Sell. Pract 212.

The late tenant or other perſon, claiming title to the premiſſes, has the ſame time to appear in as is allowed to tenants in poſſeſſion. *Ibid.*

After appearance the proceedings are the ſame as in other caſes; therefore in caſe of no appearance, the plaintiff moves for judgment againſt the caſual ejector on the affidavit abovementioned, and proceeds as in ejectments at common law. *Ibid.*

Thus, where the caſe comes within the ſtatute, there is no occaſion for the landlord to make an actual entry and ſeal a leaſe on the premiſſes, which, as we have before ſhewn, muſt be done in all other caſes, where the premiſſes are untenanted: nor is there any occaſion to prove at the trial any actual entry or ouſter; for if the defendant appear, the common conſent rule is ſufficiently binding. Doug. 483.

The affidavit will in ſome caſes be preſumed; as, after a long and quiet poſſeſſion.

Thus, where an ejectment was brought by a landlord againſt his tenant, under this ſtatute, and judgment was had againſt the caſual ejector by default, and poſſeſſion thereupon delivered: and nearly twenty years after, the tenant brings an ejectment againſt the ſame landlord for the ſame premiſſes. 1 Bur. 615.

premiſſes. The landlord, who is defendant in this latter action, is not obliged to produce ſuch an affidavit as this clauſe requires, as an eſſential requiſite previous to his original recovery; for as it was eſſentially requiſite, the Court will preſume that ſuch affidavit was regularly made at the time, and that the judgment was founded on it.

2 Bur. 668. The landlord's remedy for rent in arrear, is by action for the meſne profits, which as has been before obſerved, is conſequent to the action of ejectment, whereby the poſſeſſion only is recovered.

6 Mod. 222. If one pretending to have title to land give ſecurity to the tenants to ſave them harmleſs upon paying him the rent, and afterwards another recover in ejectment againſt them, they have no remedy upon the ſecurity until recovery of the meſne profits.

SECTION V. *Of the Remedy for the Landlord, under the Statute* 11 G. 2. c. 19. *where the Premiſſes are vacant.*

The injury that the landlord would ſuſtain in his profits by his lands lying fallow and his buildings going to decay, owing to the deſertion of his tenant and the actual poſſeſſion of the premiſſes remaining in no one, is remedied by the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 16. which after ſtating that, whereas landlords are often great ſufferers by tenants running away in arrear, and not only ſuffering the demiſed premiſſes to be uncultivated without any diſtreſs thereon, whereby their landlords or leſſors might be ſatisfied for the rent-arrear, but alſo refuſing to deliver up the poſſeſſion of the demiſed premiſſes, whereby the landlords are put to the expence and delay of recovering in ejectment, enacts, that if any tenant holding any lands, tenements, or hereditaments at a rack-rent, or where the rent reſerved ſhall be full three fourths of the yearly value of the demiſed premiſſes, who ſhall be in arrears for one year's rent, ſhall deſert the demiſed premiſſes and leave the ſame uncultivated or unoccupied, ſo as no ſufficient diſtreſs can be had to countervail the arrears of rent; it ſhall and may be lawful to and for two or more Juſtices of the Peace of the county, riding, diviſion, or place (having no intereſt in the demiſed premiſſes) at the requeſt of the leſſor or landlord, leſſors or landlords,

landlords, or his, her, or their bailiff or receiver, to go upon and view the ſame, and to affix or cauſe to be affixed, on the moſt notorious part of the premiſſes, notice in writing what day (at the diſtance of fourteen days at leaſt) they will return to take a ſecond view thereof; and if upon ſuch ſecond view, the tenant, or ſome perſon upon his or her behalf, ſhall not appear and pay the rent in arrear, or there ſhall not be ſufficient diſtreſs upon the premiſſes; then the ſaid Juſtices may put the landlord or landlords, leſſor or leſſors, into the poſſeſſion of the ſaid demiſed premiſſes; and the leaſe thereof to ſuch tenants, as to any demiſe therein contained only, ſhall from thenceforth become void.

Sect. 17. Provided always, that ſuch proceedings of the ſaid Juſtices ſhall be examinable in a ſummary way by the next Juſtice or Juſtices of aſſize of the reſpective counties in which ſuch lands or premiſſes lie; and if they lie in the city of *London* or county of *Middleſex*, by the Judge of the Courts of King's Bench or Common Pleas; and if in the counties palatine of *Cheſter*, *Lancaſter*, or *Durham*, then before the Judges thereof; and if in *Wales*, then before the Courts of Grand Seſſions reſpectively; who are hereby reſpectively empowered to order reſtitution to be made to ſuch tenant, together with his or her expences and coſts, to be paid by the leſſor or landlord, leſſors or landlords, if they ſhall ſee cauſe for the ſame; and in caſe they ſhall affirm the act of the ſaid Juſtices, to award coſts not exceeding five pounds for the frivolous appeal.

Note. In this and all other the like caſes, the Juſtices ought to make a record of the whole proceedings. Ad. P. St. 3075.

CHAPTER XV.

Of the Remedies for and againſt Landlord and Tenant (continued.)

For the Landlord, for Breach of Covenants and Agreements other than for Rent.

SECTION I. *By Action of Covenant.*
SECTION II. *By Action of Aſſumpſit.*

SECTION I. *Of the Action of Covenant.*

AN action of covenant or *aſſumpſit*, according as the premiſſes are demiſed by deed or not, lies for the recovery of damages for any injury ſuſtained by the landlord in conſequence of the tenant neglecting to repair the buildings, ſuffering trades to be carried on therein contrary to his covenant, treating the land in an unhuſbandmanlike manner, or committing any other breach of the agreement.

If the leaſe be by deed, the leſſor may ſeek a recompence for any breach of covenant by action of covenant:

2 Ld. Raym. 1536. An action of covenant cannot be maintained except upon a deed, and the declaration muſt ſhew that it is brought on one.

Co Lit. 231. *a.* In the caſe of joint-leſſees, if a leaſe be to *A.* and *B.* by indenture, and *A.* ſeals a counterpart, and *B.* agrees to the leaſe, but does not ſeal, yet *B.* may be charged for a covenant broken; and this though the covenant be collateral, Cro. Jac. 439. and not annexed to the land. The aſſignee of a term, however, is not liable on a mere collateral covenant.

Cro. Eliz. 212. Cro. Jac. 240. So, if one party execute an indenture, it ſhall be his deed, though the other party do not execute it: but in order to make it neceſſary for the plaintiff to ſue in covenant, the binding by deed ought to be mutual (except in the caſe of leſſee of the King's Patent): for where a defendant has never

never ſealed the indenture he cannot be ſued in that form of action.

Touching the ſealing of bonds or deeds, if it appear upon oyer that two parties ſealed it, whereas one only is ſued, the law will not intend that the other ſealed the deed, unleſs it be expreſsly averred that he did: and though the bond or deed upon oyer recite, "in witneſs whereof we "have ſet our hands and ſeals," yet that does not amount to ſuch an averment, but the defendant muſt ſhew that the bond or deed was actually ſealed by the other. 1 Saund. 291. n. 1.

There are, indeed, ſome words of art, ſuch as "indenture," "deed," or "writing obligatory," which of themſelves import that the inſtrument was ſealed by the party without an averment of ſealing. If, therefore, the declaration ſtates that *J. S.* by his "deed" did ſo and ſo, or by "indenture" covenanted or demiſed, or by his "writing "obligatory" acknowledged, *&c.* without averring in either of theſe caſes that he ſealed, ſtill the declaration is good. So, delivery, which is eſſential to a deed, is never averred. *Ibid.*

But without ſuch averment, or words of art, it is otherwiſe: for if it be alledged that *J. S.* by his "certain wri-"ting" ſimply, demiſed, or covenanted, or acknowledged, *&c.* without averring that he ſealed, the Court will not intend that the writing was ſealed. Neither does it follow, becauſe the words "in witneſs whereof we do put our "hands and *ſeals*," are uſed in the concluſion of an agreement, that therefore it was ſealed by the parties: on the contrary, it has been decided that theſe words do not amount to an averment that the parties ſealed the inſtrument. *Ibid.* *Ibid.* 320. n. 3.

Leaving the glaſs of windows cracked has been held to be a breach of covenant to repair.—So, not repairing a pavement is a breach of covenant to leave the premiſſes ſufficiently maintained and repaired: for it is within the intention of the covenant, and is *quaſi* the building; and the not repairing may be matter of value and of much prejudice to the leſſor.—So, carrying away a ſhelf, though not ſtated to be a fixture, has been held to be a breach of covenant to leave the premiſſes in the ſame order, *&c* for it ſhall be intended to be fixed. *Ibid.* 330.

Ibid. 644. A covenant to repair during the term after three months notice, and to leave the premiſſes in repair at the end of the term, are diſtinct clauſes: therefore notice is not neceſſary to ſuſtain an action for non-repair at the end of the term; for the notice refers only to reparations within the term, to which the leſſee is not tied without notice three months before.

Ibid. 645. But a covenant to keep a houſe in repair from and after the leſſor hath repaired it, is conditional, and it cannot be aſſigned as a breach that it was in good repair at the time of the demiſe, and that the leſſee ſuffered it to decay; for the leſſor muſt repair before the leſſee is liable.

Cro. Eliz. 657. If a leſſor covenants to let certain lands except ſuch a cloſe, a tortious entry by the leſſee into the excepted cloſe is ſaid to be not a breach of a condition to perform all covenants contained in the leaſe.

1 Salk. 196. Therefore if *H.* lets a houſe, excepting two rooms, and is diſturbed therein, covenant lies not: but if he had excepted a paſſage thereto, and had been diſturbed in that, it would have lain; for it well lies for a thing which the leſſee agrees to let the leſſor have out of the demiſed premiſſes.

4 Mod. 81. If a copyholder in fee makes a leaſe for years warranted by the cuſtom, in which the leſſee covenants to repair during the term, a ſurrenderee of the aſſignee of the reverſion may maintain covenant for non-repair againſt the original leſſee, although he had aſſigned the term before the reverſion was ſurrendered to the plaintiff; for a copyholder is within the

Cro. Car. 188. 579. ſtat. 32 *H.* 8. *c.* 34.—The doubt in this caſe aroſe upon the tenure of the meſſuage; for if it had been freehold, it was agreed, the action might well have been brought by the aſſignee of a reverſion againſt a leſſee for years after he had aſſigned his term, notwithſtanding the leſſor or his aſſigns had accepted the rent from the aſſignee of the leſſee; and this upon the general words of the ſtatute, which gives "the grantees and aſſignees of reverſions of lands, tene-"ments, and other hereditaments, the like advantage "againſt leſſees by entry for non-payment of rent as the "leſſors or grantors themſelves might have." This clauſe, therefore, is not confined to a covenant for the payment of rent.

If

If a farm is out of repair in the life of the anceſtor and afterwards the heir brings an action, he ſhall recover damages for the whole time; but he ought not to allege a breach in the anceſtor's life-time, becauſe that belongs to the executor. 11 Mod. 45.

A proviſo in a leaſe that the leſſor ſhall cut down the trees is a covenant, and not an exception; therefore covenant, not waſte, is the proper remedy. Cro. Eliz. 690.

A recital in an agreement in the beginning of a deed will create a covenant, upon which this action will lie.

As, where on the demiſe of a coal mine, it was recited "that before the ſealing of the indenture it had been agreed "that the plaintiff ſhould have the third part dug, *&c.*" on an action of covenant being brought on this, it was objected, that there was no covenant that the plaintiff was to have the third part: but *per Hale*—Were it but a recital that before the indenture they were agreed, it is a covenant; ſo, to ſay "whereas it was agreed to pay 20*l.*" for now the indenture confirms the former agreement by ſuch declaration, and makes it a covenant. 1 Eſp. N.P. 268. 3 Keb. 465.

This action lies by the leſſor againſt the aſſignee of the leſſee's aſſignee for a breach of covenant that runs with the land, though he be aſſignee of a part only of the premiſſes demiſed; for he is liable while he enjoys. Cro. Car. 221.

A reverſioner in fee of a houſe by one deed, and of a leaſe for years of land by another deed, may bring covenant on a leaſe againſt the perſon to whom both the houſe and land have been demiſed by the grantor of the reverſions, although he derives his right from different titles. Cro. Jac. 329.

An aſſignee in covenant need not name himſelf aſſignee where he ſhews a legal aſſignment. *Ibid.* 240.

Though a covenant be joint and ſeveral in the terms of it, yet if the intereſt and cauſe of action be joint, the action muſt be brought by all the covenantees: and on the other hand, if the intereſt and cauſe of action be ſeveral, the action may be brought by one only. So, though a man covenant with two or more jointly, yet if the intereſt and cauſe of action of the covenantees be ſeveral and not joint, the covenant ſhall be taken to be ſeveral, and each 1 Saund. 153. *Ibid. n.* 1.

of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint.

Ibid. But where two persons covenant *jointly and severally* with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject matter of the covenant be joint: as, where *A.* lets lands to *B.* and *C.* and they covenant jointly and severally with the lessor to pay the rent or the like, he may bring an action against either of the covenantors; because they are sureties for each other for the due performance of the covenants, and it is as competent for each of them to covenant for the other, as it is for a stranger to covenant for both, which is a usual thing.

Ibid. Even if the covenant were joint, and an action brought against one of the covenantors, he could take advantage of it only by a plea in abatement.—For where there are several covenantees or obligees, and one of them only brings an action, without averring in the declaration that the others are dead, the defendant may either take advantage of it at the trial as a variance upon the plea of *non est factum*, or pray oyer of the deed and demur generally. But where an action is brought *against* one of several joint covenantors or obligors, the defendant can only take advantage of it by a plea in abatement: and though it should appear upon the record that there are others who ought to be joined as defendants, yet that will not be error.

Ibid. 284. *n.* 4. For wherever any person, who ought to have been joined as a defendant, is omitted, it is pleadable in abatement only; the reason is, because such plea gives the plaintiff a better writ, which is the true criterion to distinguish a plea in abatement from a plea in bar.

Doug. 665. *in n.* As to what covenants shall be construed to be precedent or not, it has been laid down, that the dependence or independence of covenants was to be collected from the sense and meaning of the parties, and that however covenants might be in a deed, their precedency must depend on the order of time in which the intent of the transactions required their performance.

In

In covenant the plaintiff may aſſign as many breaches as he will. So in debt on bond for the performance of covenants, by ſtat. 8 & 9 *W.* 3. *c.* 11. Cro. Car. 176.

On a covenant in *London* to repair houſes in *Surry*, the breach muſt be aſſigned at the place where, *&c. viz.* at *London*. Cro. Jac. 446.

In covenant, if ſome breaches are well aſſigned and ſome not, and there is a demurrer to the whole declaration, the plaintiff ſhall have judgment for thoſe breaches which are well aſſigned. 1 Saund. 286. n. 9.

On a breach that the houſe was not in repair, a plea that the plaintiff agreed that the defendant ſhould employ a perſon four days in and about repairing the houſe, in ſatisfaction, is bad; for the defendant was obliged to do the repairs by the original covenant. 4 Mod. 88.

If I covenant to leave all the timber which is growing on the land when I take it, and at the end of the term I cut it down, but leave it there, it is a breach of the covenant: for a covenantor ſhall not defeat the intent of his covenant, which is ever to be taken moſt ſtrongly againſt himſelf. 1 Eſp. N.P. 271.

A covenant is not a duty nor a cauſe of action, till it be broken; and therefore it is not diſcharged by a releaſe of all actions; and when it is broken, the action is not founded merely upon the ſpecialty, as if it were a duty, but ſavours of treſpaſs; and therefore an accord is a good plea to it; and ends in damages. Shep Touch. 161. *n.* 1.

But if the one party diſable himſelf from performing his part, the other party is not obliged to offer performance of his part, but may have an action immediately. 1 Eſp. N.P. 285.

As, where the leſſor covenanted with the leſſee to make him a new leaſe on ſurrender of the old within twenty years, and before the twenty years expired the leſſor aliened the land to another by fine: it was adjudged, that the action lay immediately, for he had diſabled himſelf to accept a ſurrender and ſo to make a new leaſe. Cro. Eliz. 449.

If, however, a man have lands for a term of years, and covenant to leave them in as good a plight as he found them, although he pull down the houſes, the leſſor ſhall not have an action of covenant before the end of the term; for the covenant has relation thereto, and he may rebuild F. N. B. 145. K.

them.—But if he do waſte in wood, covenant lies; for he cannot repair it.

4 Mod. 89. As to the plea of "accord and ſatisfaction," in covenant, where the damages are uncertain and to be recovered, a leſſer thing may be done in ſatisfaction, and there "accord
Cro. Jac. 99. "and ſatisfaction" is a good plea; as to an action on a covenant to repair.

4 T. R. 75. On a covenant that runs with the land, evidence that the defendant is as heir will ſupport a declaration charging him as aſſignee.

5 T. R. 564. The leſſee of a coal mine, who covenants to pay a certain ſhare of all ſuch ſums of money as the coals ſhould ſell for at the pit's mouth, is not liable under that covenant to pay to the leſſor any part of the money produced by the ſale of the coals elſewhere than at the pit's mouth; and evidence of the leſſee's having accounted with the leſſor, and paid him the ſhare of the money produced by the ſale of coals elſewhere, is not admiſſible to explain the intention of the parties.

3 T. R. 307. If the breach of a covenant be aſſigned thus: "That the "defendant has not uſed the farm in an huſbandmanlike "manner, but on the contrary has committed waſte," the plaintiff cannot give evidence of the defendant's uſing the farm in an unhuſbandmanlike manner, if it do not amount to waſte.—On the former words of the breach, had they ſtood alone, ſuch evidence might have been given.

Cro. Jac. 142. In covenant for non-repair (as for not repairing hedges and not ploughing land) the writ of enquiry ſhall be to the place where the leaſe was made.

Ibid. 125. Covenant lies againſt an aſſignee on a covenant not to plough, although aſſigns are not named in the deed; for it runs with the land.

Bac. Abr. tit. Covenant (E. 3.) So, if *A.* leaſes lands to *B.* and *B.* covenants to pay the rent, repair houſes, *&c.* during the ſaid term, and afterwards aſſigns to *C.* the aſſignee is bound to perform the covenants during the term of the firſt leſſee, though the aſſignee be not named; becauſe the covenant runs with the land made for the maintenance of a thing *in eſſe* at the time of the leaſe made.

Ibid. So, if *A.* demiſes to *B.* ſeveral parcels of land, and the leſſee

leſſee covenants for him and his aſſigns to repair, *&c.* and after the leſſee aſſigns to *D.* all his eſtate in parcel of the land demiſed, and *D.* does not repair that to him aſſigned, the leſſor may have an action of covenant againſt *D.* the aſſignee.

For a covenant may be dividable and follow the land; wherefore an action of covenant will lie againſt an aſſignee of part of the thing demiſed. Cro. Car. 222.

If a leſſee covenants that he and his aſſigns will repair the houſe demiſed, and the leſſor grants over the term, and the aſſignee does not repair it, an action of covenant lies either againſt the aſſignee at common law, becauſe this covenant runs with the land, or it lies againſt the leſſee at the election of the leſſor, who may charge both, but execution ſhall be againſt one of them only; for if he take both in execution, he that is laſt taken ſhall have an *audita querela.* Cro. Jac. 523.

So, the executor of a leſſee is liable to the grantee of the reverſion on ſuch a covenant; though the leſſee may have aſſigned his term and the grantee have accepted rent of the aſſignee. 4 Mod. 88.

For the perſonal repreſentative of a leſſee for years is his aſſignee; and a covenant to repair runs with the land, as it is to be performed on it, and therefore binds the aſſignee. So, with reſpect to a covenant to make further aſſurance. 1 Ld. Raym. 553. Cro. Car. 503.

So, if there is a covenant which runs with the land and the leſſee aſſigns over, and the aſſignee dies inteſtate, the leſſor may have covenant againſt the adminiſtrator of the aſſignee and declare againſt him as aſſignee: for ſuch covenants bind thoſe who come in by act of law, as well as by act of the parties. Eſp. N. P. 290.

As to the extent to which the leſſee or aſſignee is liable in covenant there is a conſiderable difference.

1. The leſſee has, from his covenant, both a privity of contract and of eſtate; and though he aſſigns, and thereby deſtroys the privity of eſtate, yet the privity of contract continues, and he is liable in covenant notwithſtanding the aſſignment. Doug. 458. 764.

2. But the aſſignee comes in only in privity of eſtate, and therefore

Bac. Abr. tit. Covenant (E. 4.) therefore is liable only while in poſſeſſion: except in the caſe of rent, for which though he aſſign over he is liable as to the arrears incurred before as well as during his enjoyment; and ſuch aſſignee was made liable in equity, though the privity of eſtate was deſtroyed at common law.

Peake R. 239. Aſſignees of a bankrupt are not liable for the rent of premiſſes aſſigned to them by the commiſſioners unleſs they take poſſeſſion.

2 Show. R. 31. If a leaſe be made for twenty-one years, with a further covenant by the leſſor "that the leſſee ſhall have the ſame "for twenty-one years more after the expiration of the "ſaid term, and ſo from twenty-one years to twenty-one "years, until ninety-nine years *thence* next enſuing ſhall be "complete and ended," the firſt twenty-one years ſhall not be reckoned part of the ninety-nine years.

Where the breach aſſigned was in two covenants, and it appeared, that for the one, the plaintiff had no cauſe of action, and for the other a good cauſe, and iſſue was joined on both, and found for the plaintiff in both and damages entirely aſſeſſed; the plaintiff could not have judgment.

2 Eſp. R. 690. To an action of covenant for not pulling down part of a houſe, called The Cherry Tree at South-gate, in *Middleſex*, which had been let by the plaintiff to the defendant's teſtator; the plea was, that the teſtator had repaired and beautified other parts of the premiſſes, at the plaintiff's requeſt, which the plaintiff had accepted in ſatisfaction; replication, proteſting that the plaintiff did not requeſt the teſtator to repair; and replying that he did not accept the repairs in ſatisfaction. It appeared that the plaintiff had demiſed the houſe to the teſtator, who had covenanted to pull down the corner of it for the purpoſe of letting the plaintiff make a cart way over the place where the corner of the houſe ſtood. Lord *Kenyon*.—The plaintiff has demiſed the houſe called The Cherry Tree, and conſequently the ground on which it ſtood. The way he claims is to be made over part of the ground on which the houſe ſo demiſed ſtood. Every deed is to be taken moſt ſtrongly againſt the grantor. If the corner of the houſe is pulled down, the plaintiff cannot uſe the ground on which it ſtood, becauſe it paſſed by the demiſe; and not having reſerved in the deed any right to uſe

it unleſs the plaintiff had ſo reſerved it, he cannot claim it as a way but by preſcription: but as the teſtator did covenant to pull down the corner of the houſe, and has not done ſo, there muſt be a verdict for the plaintiff, but only for nominal damages.

Reſpecting relief by bill in equity the party cannot ſeek for ſpecific performance of a covenant to repair. 3 Atk. 515.

But upon a covenant to build, the covenantee is clearly entitled to apply to a Court of equity for a ſpecific performance; for to build is one entire thing, and if not done prevents that ſecurity for his rent to which the leſſor is entitled by virtue of a building leaſe. *Ibid.*

Where a perſon on a building leaſe covenants to new build the brick meſſuages on the premiſſes, the rebuilding ſome and repairing others was held not to be ſufficient to anſwer the covenant, but the leſſee muſt rebuild the whole. *Ibid.* 512; 3 Br. R. 66. *contra.*

Section II. *Of the Action of Aſſumpſit.*

If the leaſe be by writing without deed, or by parol demiſe, the landlord's remedy for the breach of ſuch ſtipulations, as the terms of the agreement expreſs or the contract implies, is by action of *aſſumpſit*; for an action upon the caſe on *aſſumpſit*, (or as it is alſo called *on promiſes*) is an action which the law gives the party injured by the breach, or non-performance of a contract legally entered into; it is founded on a contract either expreſs or implied by law, and gives the party damages in proportion to the loſs he has ſuſtained by the violation of the contract.

An agreement to leave a farm as he found it is an agreement to leave it in tenantable repair, if he found it ſo; and will maintain a declaration ſo laid. 2 Bl. R. 840.

In ſpecial *aſſumpſit* againſt the tenant for not performing his agreements, the eſtate of the leſſor is an immaterial averment, if the tenant has had the enjoyment of his leaſe. For the true rule is, that on the general iſſue in an action on the caſe, all *material* averments are denied and put in iſſue, but nothing elſe. The eſtate of the plaintiff is not a material averment; for a leaſe by a tenant in tail (as the plaintiff in this caſe was) is not void, but only voidable by the iſſue in tail: it had not been nor could be avoided during the life *Ibid.*

of

of the lessor; nor does it lie in the mouth of the defendant, who has enjoyed the fruit of it, to dispute its validity. That therefore being an immaterial averment, the plaintiff, (notwithstanding he was mistaken in his title) was held to be entitled to recover on the first count of the declaration, which stated that the lands descended to him in fee on the death of his father, as son and heir.

A tenant at will even is bound to keep the premisses in repair, and to use the land fairly according to the course of husbandry which the nature of the soil may require, and the custom of the country points out as being proper. It seems indeed, that those covenants which are implied in a lease, (of which we have in a preceding part of this work made more particular mention,) subsist between landlord and tenant as resulting from this relative situation, by whatever means that situation is created; so that the breach of any of them is a wrong for which the law affords a remedy: an action on the case therefore will lie for damages arising from the neglect to repair.

Co. Lit. 56. b. n. 2.

6 T. R. 319.

An agreement, (as has been before observed) though not under seal, may be declared on specially, in which case it may be said to bind the parties by its own force; or the plaintiff may in some instances declare generally, and give the written contract in evidence.

2 Esp. R. 590.

A tenant from year to year is bound as has been observed only to fair and tenantable repairs, so as to prevent waste or decay of the premisses, but is not bound to do substantial and lasting repairs.

CHAPTER

CHAPTER XVI.

Of the Remedies for Waſte.

SECTION I. *By Action of Waſte on the Statute of* Glouceſter.

SECTION II. *Action on the Caſe in the Nature of Waſte.*

SECTION III. *In Equity.*

SECTION I. *Of Waſte on the Statute of* Glouceſter.

REMEDIES for waſte lay at common law by prohibition of waſte and action of waſte: in favour of the owner of the inheritance, however, the ſtatutes of *Marlbridge*, 52 *H.* 3. *c.* 23. and of *Glouceſter*, 6 *E.* 1. *c.* 5. provided that the writ of waſte ſhall not only lie againſt tenants by the law of *England* (or curteſy) and thoſe in dower, but againſt any farmer or other that holds in any manner for life or years: ſo that for above five hundred years paſt all tenants merely for life or for any leſs eſtate have been puniſhable or liable to be impeached for waſte both voluntary and permiſſive; unleſs their leaſes be made, as ſometimes they are, without impeachment of waſte, *abſque impetitione vaſti*; that is, with a proviſion or protection that no man ſhall *impetere* or ſue him for waſte committed. But tenant in tail, after poſſibility of iſſue extinct, is not impeachable for waſte; becauſe his eſtate was at its creation an eſtate of inheritance, and ſo not within the ſtatutes. [But it is ſaid, that although ſuch tenant is not puniſhable for waſte, yet if he cuts down trees, they are not his property, 4 *Co.* 63. *Co. Lit.* 276. but will belong to the firſt perſon living at the time who has an eſtate of inheritance, 3 *P. Wms.* 266.] Neither does an action of waſte lie for the debtor againſt tenant by ſtatute recognizance, or *elegit*, becauſe againſt them the debtor may ſet off the damages in account: but it ſeems 2 Bl. Com. 283.

ſeems reaſonable that it ſhould lie for the reverſioner expectant on the determination of the debtor's own eſtate, or of thoſe eſtates derived from the debtor.

By the ſtatute of *Marlbridge*, ſingle damages only could be recovered, except in the caſe of a guardian; but the ſtatute of *Glouceſter* directs that tenant in dower, by the curteſy, for life, or years, ſhall loſe and forfeit the place wherein the waſte is committed, and alſo treble damages to him that hath the inheritance. The ſtatute ſpeaks of *terms of years* in the plural number; but though it be a penal law, whereby treble damages and the place waſted ſhall be recovered, yet a tenant for half a year, being within the ſame miſchief, ſhall be within the ſame remedy, though it be out of the letter of the law. The expreſſion of the ſtatute is, that "he ſhall forfeit the thing which he hath "waſted;" and it hath been determined that, under theſe words, the place is alſo included.—If waſte be done *ſparſim* or here and there, all over a wood, the whole wood ſhall be recovered; or if in ſeveral rooms of a houſe, the whole houſe ſhall be forfeited; becauſe it is impracticable for the reverſioner to enjoy only the identical places waſted, when lying interſperſed with the other. But if waſte be done only at one end of a wood (or perhaps in one room of a houſe, if that can be conveniently ſeparated from the reſt) that part only is the *locus vaſtatus*, or thing waſted, and that only ſhall be forfeited to the reverſioner.

Co. Lit. 54.

The redreſs under this ſtatute for this injury of waſte is of two kinds, preventive and corrective; the former by writ of *eſtrepement*, the latter by action of waſte.

Eſtrepement. F. N. B. 3 Inſt. 328. 5 Rep. 115.

Eſtrepement, from *extirpare*, ſignifies to draw away the heart of the ground, by ploughing and ſowing it continually, without manuring or other good huſbandry, whereby it is impaired, and may be alſo applied to the cutting down trees, or lopping them farther than the law allows. The word is uſed for a writ which lies in two caſes: the one by the ſtatute of *Glouceſter*, when a perſon having an action depending, as a *formedon*, writ of right, *&c.* ſues to prohibit the tenant from making waſte during the ſuit; the other is for the demandant who is adjudged to recover ſeiſin of the land in queſtion after judgment and before execution

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ſued by the writ of *habere facias poſſeſſionem*, to prevent waſte being made before he gets into poſſeſſion. By an equitable conſtruction of the ſtatute of *Glouceſter*, and in advancement of the remedy, it is now held that a writ of *eſtrepement* to prevent waſte may be had in every ſtage, as well of ſuch actions wherein damages are recovered, as of thoſe wherein only poſſeſſion is had of the lands; for perhaps the tenant may not be able to ſatisfy the demandant his full damage. In an action of waſte itſelf, therefore, (of which hereafter,) to recover the place waſted and alſo damages, this writ will lie as well before as after judgment, for the plaintiff cannot recover damages for more waſte than is contained in his original complaint; neither is he at liberty to aſſign or give in evidence any waſte made after ſuing out the writ: it is therefore reaſonable that he ſhould have this writ of preventive juſtice, ſince he is in his preſent ſuit debarred of any further remedy.

If a writ of *eſtrepement* forbidding waſte be directed and delivered to the tenant himſelf, as it may be, and he afterwards proceeds to commit waſte, an action may be carried on founded upon this writ, wherein the only plea of the tenant can be *non fecit vaſtum contra prohibitionem*, and if upon verdict it be found that he did, the plaintiff may recover damages and coſts, or the party may proceed to puniſh the defendant for the contempt. Moor, 100.

This writ lies properly where the plaintiff in a real action ſhall not recover damages by his action, and as it were ſupplies damages; for damages and coſts may be recovered for waſte, after the writ of *eſtrepement* is brought. *Ibid.* 2 Inſt. 328.

By virtue of either of theſe writs, the Sheriff may reſiſt thoſe that do, or offer to do waſte; and if otherwiſe he cannot prevent them, he may lawfully impriſon the waſters, or make a warrant to others to impriſon them; or, if neceſſity require it, he may take the *poſſe comitatus* to his aſſiſtance. *Ibid.* 329.

The writ of waſte is alſo an action partly founded on the common law, and partly upon the ſtatute of *Glouceſter*, and may be brought by him that hath the immediate eſtate of inheritance, whether it be fee-ſimple or fee-tail; provided the reverſion continue with him, in the ſame ſtate in which *Writ of Waſte.* 2 Wood's Inſt. 951.

it

it was at the time of the waſte done, and be not granted over; for though he take the eſtate back again, the action
3 Mod. 93. is gone, becauſe the eſtate did not continue. This is a remedial and yet a penal law, and therefore ſhall have a favourable conſtruction.

Ibid. A purchaſer (as contradiſtinguiſhed from one by deſcent) ſhall have an action of waſte.

So, a parſon, *&c.* for it is the dowry of the church.

Ibid. But if a leaſe be made to *A.* for life, remainder to *B.* for life, remainder to *C.* in fee, no action of waſte lies againſt the firſt leſſee during the eſtate in the mean remainder, for then his eſtate would be deſtroyed: otherwiſe if *B.* had a meſne remainder for years, for that would have been no impediment, the recovery not deſtroying the term for years.

If the leſſee for years commit waſte and his term expires, yet the leſſor ſhall have an action of waſte for the treble damages.

Co. Lit. 356. If a biſhop make a leaſe for life or years, and die, the leſſee, the ſee being void, doth waſte, the ſucceſſor ſhall have no action of waſte.

2 Mod. 62. Tenant in common need not join in an action of waſte unleſs he has made a leaſe for years with another.

2 Inſt. 403. This action is alſo maintainable in purſuance of the ſtat. of *Weſtm.* 2. (13 *E.* 1. *c.* 22.) by one tenant in common of the inheritance againſt another, who makes waſte in the eſtate holden in common: the equity of which ſtatute extends to joint tenants; but not to coparceners, becauſe they, by the old law, might make partition; but tenants in common and joint-tenants could not, wherefore the ſtatute gave them this remedy, compelling the defendant either to make partition and take the place waſted to his own ſhare, or give ſecurity not to commit any farther waſte. But theſe tenants in common and joint-tenants are not liable to the penalties of the ſtatute of *Glouceſter*, which extends only to ſuch as have life eſtates and do waſte to the prejudice of the inheritance.

Co. Lit. 54. *in. n.* Cro. Eliz. 683. The grantee of a reverſion ſhall have waſte: therefore if the leſſee of land opens a coal mine and grants all his intereſt, excepting the mine, waſte will lie by an aſſignee of the reverſion againſt the grantee for coals afterwards dug by

by the grantor; for the exception being of a thing with which he had not power to meddle, was void.

A proviſo in a leaſe that the leſſor ſhall cut down trees, is a covenant and not an exception: therefore the heir may maintain waſte if they be cut down. But if a leaſe be made excepting the wood and timber, an action of waſte will not lie againſt the leſſee for cutting it down, becauſe not demiſed. *Ibid.* 690. Bull. N. P. 119.

If the termor aſſign his term, except the trees, and afterwards the trees are cut down, waſte will lie againſt the aſſignee, for the exception was void: but if tenant for life make a leaſe for years, he may except the trees, becauſe he ſtill remains tenant and is chargeable in waſte.

Waſte lies againſt an executor *de ſon tort* of a term of years or of other chattels; by ſtat. 30 *C.* 2. *c.* 7, and 4 & 5 *W.* & *M. c.* 24. *s.* 12.

An occupant ſhall be puniſhed for waſte.—So, if tenant for life or years, or their aſſignee make a grant over, and notwithſtanding take the profits, an action of waſte lies againſt him, by him in the reverſion or remainder, by the ſtatute. Co. Lit. 54.

One may have an action of waſte upon ſeveral leaſes, and upon ſeveral grants of a reverſion. Cro. Jac. 330. Poph. 25.

By the cuſtom of *London*, waſte lies at common law, for waſte in houſes there, and now ſince the ſtatute of *Glouceſter*, waſte lies there in caſes within the ſtatute as well as in others: for though the ſtatute gives an action of waſte in caſes where it would not lie before, and gives alſo treble damages *et locum vaſtatum*, yet it does not take away the juriſdiction of any Court that before held plea of waſte.—So a writ of *eſtrepement* lies in *London pendente placito*, or after judgment and before execution, to ſtay waſte. Com. Dig. Waſte (B. 1.)

No perſon is entitled to an action of waſte againſt a tenant for life, but he who has the *immediate* eſtate of inheritance in remainder or reverſion, expectant upon the eſtate for life. If between the eſtate of the tenant for life who commits waſte and the ſubſequent eſtate of inheritance there is interpoſed an eſtate of freehold to any perſon *in eſſe*, then during the continuance of ſuch interpoſed eſtate, the action of waſte is ſuſpended; and if the firſt tenant for life dies during the continuance of ſuch interpoſed eſtate, the action Co Lit. 218. *b. n.* 2.

is gone for ever. But though while there is an eſtate for life interpoſed between the eſtate of the perſon committing waſte and that of the reverſioner or remainder-man in fee, the remainder-man cannot bring his action of waſte; yet if the waſte be done by cutting down trees, *&c.* ſuch remainder-man in fee may ſeize them, and if they are taken away or made uſe of before he ſeizes them, he may bring an action of trover: for in the eye of the law a remainder-man for life has not the property of the thing waſted; and even a tenant for life in poſſeſſion has not the abſolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance, of which it is conſidered a part, and therefore it belongs to the owner of the fee.

The action of waſte is a mixed action: partly real, ſo far as it recovers land; and partly perſonal, ſo far as it recovers damages; for it is brought for both of thoſe purpoſes, and if waſte be proved, the plaintiff ſhall recover the thing or place waſted, and alſo treble damages by the ſtatute of *Glouceſter*.

The proceſs in the action of waſte is, firſt a writ of ſummons made by the curſitor of the county where the land lies, and on the return of this writ the defendant may eſſoin and the plaintiff adjourn, *&c.* Then a *pone* is made out by the filazer of the county, on the return of which a *diſtringas* iſſues for the defendant to appear, and upon his appearing the plaintiff declares, and the defendant pleads, &c.

Poph. 24. The writ of waſte calls upon the tenant to appear and ſhew cauſe why he hath committed waſte and deſtruction in the place named to the diſinheriſon of the plaintiff. If the defendant makes default and does not appear at the day aſſigned him, then the Sheriff is to take with him a jury of twelve men and go in perſon to the place alledged to be waſted, and there enquire of the waſte done and the damages, and make a return or report of the ſame to the Court, upon which report the judgment is founded.—But if the defendant appears to the writ and afterwards ſuffers judgment to go againſt him by default, or upon a *nil dicit* (when he makes no anſwer or puts in no plea in defence) this amounts to a confeſſion of the waſte, ſince having once appeared,

Cro. Eliz. 78, 290.

peared, he cannot pretend ignorance of the charge. The Sheriff, therefore, ſhall not go to the place to enquire of the fact, but ſhall only (as in default in other actions) make enquiry of the *quantum* of damages.

In waſte the plaintiff muſt ſhew how he is entitled to the inheritance; therefore, if he counts upon a leaſe by himſelf, he muſt ſhew his ſeiſin in fee, and demiſe to the defendant. Com. Dig. tit. Pleader (3. O. 2.)

In every caſe the plaintiff in this action muſt ſhew his title. Thus, if he claim by fine, he muſt plead the fine and the uſes of it; if by common recovery, he muſt ſhew the recovery and uſes: ſo, if by grant of the reverſion, he muſt ſhew how he claims by aſſignment; and if the huſband and wife in right of the wife ſue, they muſt alledge the reverſion in both: ſo, if the plaintiffs ſue as parceners or joint-tenants, the declaration ſhould ſhew that they are ſo. *Ibid.*

If however the plaintiff conclude *ad exhæreditationem*, it ſupplies the omiſſion of the eſtate of which he was ſeiſed, after verdict: ſo, if he ſhews the ſpecial matter it is ſufficient, though he does not name himſelf aſſignee: ſo, if the writ is general, *cujus hæres* the plaintiff is, though he has a ſpecial inheritance. *Ibid.*

If the plaintiff has the reverſion, he ſhall ſay that the defendant holds of him: but it is otherwiſe, if waſte be brought by him in remainder; or by the lord who has by eſcheat, for there is no tenure of him. *Ibid.*

The plaintiff muſt always charge the defendant in the *tenet* or in the *tenuit*; for there is no other form: and muſt charge him as aſſignee, executor, *&c.* So, he muſt charge him by virtue of the leaſe by which he is poſſeſſed: as, if the defendant be in by deviſe, he muſt charge him as tenant *ex legatione*. If defendant claims by a remainder for life or for years, which is now in poſſeſſion, he may be charged upon a demiſe to him: but if he be in by the ſtatute of Uſes, it is ſufficient to charge him generally, without ſaying on whoſe demiſe. *Ibid.* (3. O. 3.)

The declaration muſt aſſign the waſte conformably to the writ: for if the writ is for waſte in land, and it is aſſigned in cutting wood, it is bad. *Ibid.* (3. O. 4.)

If waſte be aſſigned in land, it muſt ſay in what pariſh it lies. *Ibid.* (3. O. 5.)

It is ſufficient to aſſign waſte directly, without ſhewing the particular manner in which it was committed: as, if it is in germins, it is ſufficient to ſay, that he deſtroyed the germins generally, without ſaying that he ſuffered the hedges of the wood to be neglected, whereby cattle entered and eat the germins: and if a ſtranger commit the waſte, that fact need not be mentioned.

But the declaration muſt particulariſe the quality or quantity of the waſte; as if it is in cutting trees, the plaintiff muſt ſhew the number of the trees.—If the demiſe is of a moiety of a manor, and other lands, and the waſte aſſigned in wood, parcel of the premiſſes, it is bad: for it cannot be parcel of the manor, and alſo of the other lands.

2 Show. R. 8. A declaration in waſte that the defendant plowed up the land, which was paſture, *et ſic vaſtum fecit*, was held bad for

1 T. R. 145. uncertainty; even after verdict.—After verdict, nothing is to be preſumed but what is either expreſsly ſtated in the declaration, or neceſſarily implied from thoſe facts which are

Cowp. 826. Doug. 683. ſtated: for a verdict will cure ambiguity only, but will not aid where the gift of the action is omitted to be laid in the declaration.

Ibid. (3. O. 6.) The declaration muſt be *ad exhæreditationem* of the plaintiff: if he be ſeiſed in right of his wife, it ſhall be *ad exhæreditationem* of the wife. So, if there are ſeveral plaintiffs, there may be ſummons and ſeverance; for it is a real action, and *ad exhæreditationem*.

The general iſſue to an action of waſte, is "no waſte "done;" but this admits nothing, but puts the whole declaration in iſſue; and may be pleaded in all caſes where there

Bull. N. P. 119. is no waſte, as if deſtruction happens by tempeſt, *&c.* If therefore the defendant plead *nul waſte fait*, and iſſue is taken thereupon, the plaintiff muſt prove his title as laid in the declaration: he muſt likewiſe prove the kind of waſte laid in the declaration; and therefore if he alledge waſte in cutting trees, and the jury find that he ſtubbed them and

Ibid. 120. did not cut them, it is variance.—Defendant may alſo, under the general iſſue give in evidence any thing which proves that it is no waſte; as that it was by tempeſt, *&c.* as before obſerved; but not that it was for repairs, or that the plaintiff gave him leave to cut, or that he had not repaired before the

the action brought. Neither will it be any defence that a ſtranger did it, for if the plaintiff ſhould not have his action of waſte, he would be without remedy; and the defendant may bring treſpaſs againſt the ſtranger, and recover his damages. But it would be a good plea to ſay that the plaintiff himſelf did it.

If ſeveral waſtes are aſſigned, and the defendant is not guilty of part of any, he may plead "no waſte done" to all together, and need not ſay ſo every part ſeverally "no "waſte." Com. Dig. tit. Pleader (3. O. 7.)

If the tenant repairs before action brought, it is ſaid, he in reverſion cannot have an action of waſte; but the tenant cannot, in ſuch caſe, plead that he did no waſte, but muſt plead the ſpecial matter; for 1 Inſt. 282. Cro. Jac. 658.

"No waſte done" is no plea where the defendant has matter of juſtification, or excuſe. Com Dig. *ut ante.*

Therefore, if there be a leaſe to *A.* for two years, and afterwards a leaſe to *B.* for ten years, in waſte againſt *B.* for waſte during the two years, he cannot plead "no waſte "done." *Ibid.*

The defendant may plead in juſtification that he took for repairs; as for repair of the fences and other neceſſary uſes: or, that he pulled down to rebuild and repair the houſe, fences, *&c.* Therefore tenant for life may juſtify cutting down timber upon the ground letten, and repairing the houſe therewith, though he is not compellable to repair it if it were ruinous when the leaſe was made.—But it is not ſufficient to ſay, that he took for repairs, if he does not add that he uſed or keeps for repairs: for it is waſte for a leſſee to cut down timber trees for the purpoſes of repairs when there is no occaſion, for were it otherwiſe, every farmer might cut down all the trees growing upon the land under pretence that he keeps them to employ about reparations whenever ſuch ſhall become neceſſary. Co. Lit. 54. *b.* Com Dig. *ut ante.* (2. O. 12.) Cro. Eliz. 592.

So he may plead that he took them for other neceſſary botes; as for wain-bote, cart-bote, plough-bote, or hedge-bote, or for gates, or ſtiles; or for making utenſils in huſbandry; or for fuel. So, he may plead that they were dead wood, bearing neither fruit nor foilage. Com. Dig. *ut ante,* (3. O. 12.)

Ibid. (3. O. 14.) So, he may plead that the leaſe was without impeachment of waſte: or, that the plaintiff's anceſtor made a bargain and ſale of the trees to him: or, that the leſſor covenanted that the leſſee might cut down trees. But it is no bar, that the leſſor covenanted to repair, and that he did it for him.

Ibid. (3. O. 15.) He may alſo plead, that he has rebuilt and ſince kept in repair; for he may plead in excuſe, that he repaired before action brought, for the jury muſt view the place waſted: but "repaired pending the ſuit" is no plea. So he may plead that it was ſo ruinous at the commencement of his leaſe, that he could not repair.

Ibid. (3. O. 8. 16.) So, he may plead a releaſe from the plaintiff or one of the plaintiffs, in bar: for if waſte be by two plaintiffs in the *tenuit*, a releaſe by one is a bar to both: but where waſte is in the *tenet*, a releaſe by one plaintiff bars himſelf only.

Ibid. So, to waſte in the *tenuit*, he may plead accord with ſatisfaction.

Ibid. (3. O. 20.) So, the defendant may plead in abatement to the plaintiff's title, or that the plaintiff has nothing in reverſion; but he ought to ſhew how the reverſion is deveſted, for "nothing "in reverſion" generally, will be bad; except where waſte is brought by a grantee of the reverſion.

So, if the plaintiff's title fails *pendente lite*, the defendant may plead it after the laſt continuance.

Ibid. (3. O. 19.) So, he may plead a meſne remainder-man ſtill alive.

Ibid. (3. O. 18.) So, the defendant may plead no demiſe made to him: or, no demiſe as to part: or, that wood was excepted by the demiſe.—So, that he has nothing by the aſſignment of *B.* or that after the demiſe, the defendant aſſigned, before which aſſignment no waſte was done.

Ibid. To the plea of aſſignment before waſte done, the plaintiff may reply, that the aſſignment was by fraud, and he afterwards took the profits: and if the defendant rejoins, he muſt traverſe the pernancy of the profits, not the fraud.

Com. Dig. tit. Pleader (3. O. 21.) In waſte, if iſſue is joined, ſix jurors at the leaſt ought to have a view of the place waſted, otherwiſe the trial ſhall be ſtaid: if therefore waſte be aſſigned in ſeveral places, the jury may find "no waſte done" in a place of which they had no view: and they ought, it ſeems, to have a view (as the

the *venire facias* directs them to have,) though the iſſue be upon a collateral point, and the waſte be confeſſed. Whether the *venire facias* be returned or not, the Court may examine as to the fact of the jury having viewed or not; for the return does not conclude the parties: but it is not neceſſary, that the officer return upon the *diſtringas juratorum*, that the jury have viewed; or that he was preſent at the view.

If however the waſte be aſſigned in a wood *ſpecifim*, it is ſufficient if the jury view the wood, though they do not enter into it. So, if it be in ſeveral rooms of a houſe.

Touching the judgment in waſte, if there be judgment for want of an appearance upon the diſtringas by the ſtat. *W.* 2. *c.* 14. the Sheriff taking twelve, *&c.* ſhall go to the place waſted and take inquiſition of the damage, and upon the return thereof, there ſhall be damage. *Of the Judgment.*

When the waſte and damages are aſcertained, either by confeſſion, verdict, or enquiry of the ſheriff, judgment is given in purſuance of the ſtatute of *Glouceſter c.* 5. that the plaintiff ſhall recover the place waſted; for which he has immediately a writ of ſeiſin, provided the particular eſtate be ſtill ſubſiſting; (for if it be expired there can be no forfeiture of the land;) and alſo, that the plaintiff ſhall recover treble the damages aſſeſſed by the jury; which he muſt obtain in the ſame manner as all other damages in actions perſonal or mixed are obtained, whether the particular eſtate be expired, or be ſtill in being. 3 Bl. Com.

In an action of waſte upon this ſtatute againſt the tenant for years, for converting three cloſes of meadow into garden ground, if the jury give only one farthing damages for each cloſe; the Court (who have a kind of diſcretionary power therein) will give the defendant leave to enter up judgment for himſelf. 2 Bof. & Pull. 86.

By ſtat. 8. & 9. *W.* 3. *c.* 11. *s.* 3. a plaintiff ſhall have coſts in all actions of waſte, where the damages found do not exceed twenty nobles; which he could not at common law.

Waſte is a tort, and the remedy lies at law. Therefore where timber is cut down, trover may be brought to recover 3 Atk. 263. 755.

the value.—In an action of waſte, the place waſted is recovered in an action of trover, damages.

Bid. 757. Trover may be brought againſt the executor of the perſon who converts the timber to his own uſe.

2 P. Wms. 241. But though trover will lie at law, it may be very neceſſary for the party who has the inheritance to bring his bill in equity, becauſe it may be impoſſible to diſcover the value of the timber, it being in the poſſeſſion of and cut down by the tenant.

1 P. Wms. 406. Yet whether a bill for an account may be brought by the aſſ.
3 Atk. 164 *acc.* lord of a manor, or a leſſor, againſt a tenant for timber felled, ſeems to be doubtful.

Section II. *Of the Action upon the Caſe in the Nature of Waſte.*

Since the ſtatute of *Glouceſter*, which gives no more coſts than damages, it is uſual to bring treſpaſs or caſe in the nature of waſte inſtead of the action of waſte.

Cro. Car. 187. Either an action in the caſe or treſpaſs will lie, at the plaintiff's election, againſt his tenant at ſufferance [more properly yearly tenant] for deſpoiling the premiſſes: and caſe is the better action to recover as much as he may be damnified becauſe he is ſubject to an action of waſte.

8 T. R. 145. One tenant in common cannot maintain an action on the caſe in the nature of waſte againſt another tenant in common (in poſſeſſion of the whole, having a demiſe of the moiety from the firſt) for cutting down trees of proper age and growth for being cut; for it is no hurt to the inheritance. If however the trees were not fit to be cut, he might maintain ſuch action.

4 T. R. 319. It is ſo notoriouſly the duty of the actual occupier to repair the fences, and ſo little the duty of the landlord, that without any agreement to that effect, the landlord may maintain an action againſt his tenant for not ſo doing, upon the ground of the injury done to the inheritance.

2 Eſp. R. 590. A tenant from year to year is only bound to fair and tenantable repairs, ſo as to prevent waſte or decay of the premiſſes, not to ſubſtantial ones.

Section

SECTION III. *Of the Remedies in Equity, in the Caſe of Waſte.*

On the ſubject of waſte, the Court of Chancery has, it ſhould ſeem, a concurrent juriſdiction with the Courts of common law.

The relief afforded by that Court, is in many caſes the moſt eligible, and in ſome, abſolutely neceſſary to be ſought, in order to prevent the commiſſion of threatened, or impending waſte: for the Court will ſtay waſte upon application by bill brought for that purpoſe praying an injunction.

At the common law, prohibition went out of Chancery, againſt the tenant by the curteſy, in dower, or as guardian, at the prayer of him who had the inheritance, to inhibit waſte, and that before waſte committed. Com. Dig. tit. Chancery (D. 11.)

Reſpecting the remedy of the remainder-man or reverſioner (or, in the caſe of copyholds, of the lord,) againſt a tenant about to commit, or committing waſte, although a Court of Equity will not aſſiſt a forfeiture, yet the tenant in poſſeſſion ſhall be reſtrained in equity from waſte in all caſes in which waſte is puniſhable by law; and for this purpoſe, an injunction will be granted before the bill is filed. Alſo an injunction will be granted to ſtay waſte in behalf of an infant *in ventre ſa mere*. Equity will likewiſe, in ſome particular caſes, reſtrain the tenant from committing waſte, where he is diſpuniſhable by law, either by the nature of the eſtate, or by expreſs grant "without impeachment of waſte": but where, by agreement of the parties, the leaſe is made without impeachment of waſte, equity will not reſtrain the leſſee from cutting timber, ploughing, opening mines, *&c.* though ſuch leſſee ſhall be reſtrained from pulling down houſes, defacing ſeats, *&c.* 2 Eq. Ca. Abr. 399. *in n.*

When a bill is filed to reſtrain waſte or any other injury very detrimental, ſo that it is neceſſary to loſe no time, an injunction may be applied for immediately after the bill is filed, by ſpecial motion ſupported by affidavit of the grievance. Park. An. 47.

So now, an injunction ſhall be granted upon an affidavit of waſte committed, to inhibit any waſte to be committed Com. Dig. tit. Chancery (D. 11.)

by

by tenant for life or years; as to inhibit meadow, or other paſture, not ploughed within twenty years, being ploughed; but not againſt a leſſee, who had agreed to pay 20*s.* per acre *per ann.* increaſe of rent, if he ploughed a meadow, *&c.* So it will be granted to inhibit antient incloſures being thrown down; or houſes being pulled down.

Ibid. So, againſt tenant after poſſibility *&c.* or him who in reſpect of a truſt, *&c.* is not liable an action of waſte.

Ibid. So, againſt tenant for life, at the ſuit of the remainder-man in fee, though there is an intermediate remainder: and if tenant for life, without impeachment of waſte, or any other leſſee, has cut timber, ſo as not to leave ſufficient for repairs, the Court will reſtrain him from cutting any more without leave of the Court. Tenant for life, without impeachment of waſte, will be reſtrained alſo from cutting down trees in lines or avenues, or ridings in a park, whether planted or growing naturally, or trees not of a proper growth to be cut; ſo, if he will be reſtrained from pulling down the antient and capital houſe, and not only ſo, but the Court will compel him to put it in the ſame plight in which he found it.

3 Atk. 235. 755.

Com. Dig. *ut ante.*

3 Atk. 723. The Court will grant an injunction at the ſuit of a ground landlord to ſtay waſte in an under leſſee, who holds by leaſe from the original landlord; upon a certificate being produced of the waſte.

Ibid. So, the mortgagor may have an injunction to ſtay waſte againſt the mortgagee, if he cut down timber, and do not apply the money ariſing from the ſale in ſinking the intereſt and principal. So, where the mortgagor commits waſte, the Court will grant the mortgagee an injunction; for they will not ſuffer the mortgagor to prejudice the incumbrance.

Ibid. & 210.

2 Atk. 217. So, though a rector may cut down timber for the repairs of the parſonage houſe or chancel, (but not for any common purpoſe) and is entitled to botes for repairing barns and outhouſes belonging to the parſonage, an injunction to ſtay waſte in cutting down timber in the church yard, will be granted till the cauſe be heard.

3 Atk. 496. The Court will not grant an injunction to ſtay waſte in digging mines where the defendant ſets up a right to the inheritance of the eſtate, till the anſwer is come in or the

defendant has made default in not putting in his anſwer, for ſuch injunctions are never granted before the hearing, unleſs the defendant had only a term in the eſtate, for years, or for life, and the reverſion was in the plaintiff.

On motion to ſtay waſte, a particular title muſt be ſhewn; and the motion ſhould be made upon affidavit of the title, waſte committed, and a certificate of the bill filed. *Ibid.* Com. Dig. *ut ante.*

CHAPTER

CHAPTER XVII.

Of the Remedies for Rent, &c. wherein of the Landlord's Remedy againſt third Perſons.

SECTION I. *By Action on the Caſe for Nuiſances &c. to the Injury of his Reverſion.*

SECTION II. *By Action againſt the Sheriff, on Stat.* 8 Ann. c. 14. *for removing the Tenant's Goods under an Execution without paying a Year's Rent.*

SECTION III. *By Action on the Stat.* 11 G. 2. c. 19. *for aſſiſting the Tenant in a fraudulent Removal of his Goods.*

SECTION I. *Action on the Caſe for Nuiſances to the Injury to his Reverſion.*

AN action of treſpaſs on the caſe lies for a nuiſance to the habitation or eſtate of another, by which remedy the landlord may recover damages commenſurate with the degree of injury that he has ſuſtained by the deterioration of that property of which the reverſion is in him.

Com. Dig. tit. Action, &c for a Nuiſance (A.)

As, if a man have an antient houſe, and another build ſo near as to darken his windows, he may have an action upon the caſe.

So, if a man build a new houſe, and afterwards grant the adjacent ſoil, and the grantee by an edifice upon it ſtop the lights of the other houſe, though it was not an antient houſe;

Bull. N. P. 75.

for if a man build a new houſe on part of his land, and afterwards ſell the houſe to another, neither the vendor, nor any other claiming under him, may ſtop the lights: but if he ſell the vacant ground to another, and keep the houſe without reſerving the benefit of the lights, the vendee may build.

A cuſtom

A cuſtom that one may build upon a new foundation to the obſtruction of antient lights, is void. Com. Dig. *ut ante.*

If the lights of the houſe be ſtopped up by throwing logs, *&c.* this action will lie. *Ibid.*

The party having recovered in one, cannot have another action for the ſame erection: but he may maintain a new action for the continuance of it. So, if *A.* recover damages againſt *B.* for ſtopping his lights, and afterward *B.* aſſign the lands in which the nuiſance was erected, *A.* may maintain another action againſt *B.* for the continuance of the nuiſance; for before the aſſignment *B.* was anſwerable for all the conſequential damages, and it ſhall not be in his power to diſcharge himſelf by granting it over: yet *A.* may bring the action againſt the aſſignee. Though formerly a diſtinction was taken, *viz.* where the continuance occaſions a new nuiſance, and where the firſt erection has done all the miſchief; that in the firſt caſe the aſſignee is liable to an action, but not in the ſecond. 1 Ld. Raym 370. Bull. N. P. 75.

If a man fixes a ſpout to his own houſe, from whence the rain falls into the yard of another, and hurts the foundation of his buildings; this action will lie.—So, if a man dig a pit in his land, ſo near that my land falls into the pit. Com. Dig. *ut ante.*

So, it lies againſt one who erects any thing offenſive ſo near the houſe of another, that it becomes uſeleſs thereby; as a ſwine-ſty, or a lime-kiln, or a dye-houſe, or a tallow-furnace, or a privy, or a brew-houſe, or a tan-vat, or a ſmelting-houſe, or a ſmith's forge. *Ibid.*

So, if a man erect a walh-houſe, ſtable, *&c.* and put filth in it, to the annoyance of a garden. *Ibid.*

So, if a parſon permit the tithes to continue upon the ſoil, ſo that the graſs there is corrupted; or a vendee of hay, after the time agreed for carrying it away. *Ibid.*

So, if a leſſee over-charge his room with weight, whereby it falls upon the cellar beneath. *Ibid.*

So, if a man who ought to incloſe againſt my land, do not incloſe, by which the cattle of his tenants enter into my land, and do damage to me. Bull. N. P. 74.

So, an action upon the caſe lies, if a man erect a mill ſo near to my antient mill, that the water to my mill is obſtructed Com. Dig. *ut ante.*

Of the Pleas. Touching the pleas to this action, the general iſſue is, not guilty; which may be pleaded to where caſe is brought for a nuiſance in overhanging the plaintiff's houſe, *&c.* or to a nuiſance in ſtopping his lights.

Com. Dig. *ut ante* (F. 2.)

Ibid. So, the cuſtom of the city of *London*, by which a man may build upon an antient foundation againſt the lights of another; to which the plaintiff may reply by denying the cuſtom, which ſhall be tried by the mouth of the Recorder.

Ibid. But to an action upon the caſe for a nuiſance the defendant cannot plead, that being a blackſmith, he came to the houſe wherein he dwells, by the advice of the plaintiff himſelf, and there erected a forge for his trade.

Bull. N. P. 75. In an action for diverting a water-courſe, the defendant pleaded, that he was ſeiſed of two cloſes through which, *&c.* and that he and all thoſe, *&c.* had uſed to water their cattle in the ſame water-courſe, *&c.* and the Court held that one preſcription could not be pleaded againſt another, without a traverſe: but if upon the general iſſue it had been proved that the water was uſually drank up by the cattle of the defendant, the plaintiff would have failed in his preſcription.

Com. Dig. *ut ante.* If the verdict finds generally, that the houſe is not erected upon the antient foundation, the whole ſhall be abated, though it exceed only a foot.

Cro. Eliz. 374. An action of treſpaſs lies againſt the Sheriff if in executing a *fiere facias*, or any other writ, he takes a furnace, vat, *&c.* faſtened to the wall of a houſe, for it is become part of the freehold. This difference was taken in the time of Lord *Dyer*; that a furnace fixed in *medio domûs*, is but a chattel and is removeable; but otherwiſe it is, being fixed to the walls.—But treſpaſs will not lie againſt the party.

SECTION II. *Of Action on the Caſe againſt the Sheriff for removing Goods under an Execution, without paying a Year's Rent, by Virtue of the Stat.* 8 Anne, c. 14.

2 Wilſ. 141. Executions at common law took place of all debts that were not ſpecific liens; even of rents due to landlords. At length, it being thought hard that landlords ſhould not have ſomething like a ſpecific lien, Parliament gave them a remedy

remedy for one year's rent, but no more, becauſe *vigilantibus et non dormientibus jura ſubvenient.*

The remedy in queſtion is by action on the caſe by virtue of the ſtat 8. *Ann. c.* 14. for the more eaſy and effectual recovery of rents reſerved, on leaſes for life or lives, term of years, at will, or otherwiſe, by ſect. 1. of which it is enacted, "That no goods or chattels whatſoever, lying or "being in or upon any meſſuage, lands, or tenements "which are, or ſhall be leaſed for life or lives, term of "years, at will, or otherwiſe, ſhall be liable to be taken "by virtue of any execution on any pretence whatſoever, "unleſs the party at whoſe ſuit the ſaid execution is ſued "out, ſhall before the removal of ſuch goods from off the "ſaid premiſſes, by virtue of ſuch execution or extent, "pay to the landlord of the ſaid premiſſes or his bailiff, all "ſuch ſum or ſums of money as are or ſhall be due for "rent for the ſaid premiſſes at the time of the taking ſuch "goods or chattels by virtue of ſuch execution; provided "the ſaid arrears do not amount to more than one year's "rent: and in caſe the ſaid arrears ſhall exceed one year's "rent, then the ſaid party, at whoſe ſuit ſuch execution "is ſued out, paying the ſaid landlord or his bailiff one "year's rent, may proceed to execute his judgment, as he "might have done before the making of the act; and the "Sheriff or other officers are thereby impowered and re-"quired to levy and pay to the plaintiff, as well the money "ſo paid for rent as the execution money.

Sect. 8. "Provided always, that nothing in the act con-"tained ſhall be conſtrued to extend to hinder or prejudice "her Majeſty, her heirs or ſucceſſors, in the levying, re-"covering, or ſeizing, any debts, fines, penalties, or for-"feitures due or payable to her Majeſty, *&c.* but that it "ſhall and may be lawful for her Majeſty, *&c.* to levy, re-"cover, and ſeize ſuch debts, *&c.* in the ſame manner as if "the act had never been made."

This ſtatute ſhall have a liberal conſtruction: and the words "party at whoſe ſuit the execution is ſued out" *&c.* ſhall be conſtrued to mean either the plaintiff or defendant, whoſe judgment and execution it is. 2 Wilſ. 141.

The action lies by an executor or adminiſtrator againſt the bailiff of a liberty for executing a *fieri facias*, and re- 1 Str. 212. Fort. 359. 360.

moving the goods off the premiſſes before the landlord was paid a year's rent: for the teſtator or inteſtate had an intereſt for which his executor or adminiſtrator may bring an action.

1 Str. 97. But, where the goods were taken and the money levied before adminiſtration taken out, it was held, that as execution was executed, that is to ſay, as the goods were actually ſold, the adminiſtrator came too late. *Powis*, J. was however of opinion, it ſeems, that the adminiſtration ſhould have relation to the time of the death of the inteſtate, becauſe, by the eccleſiaſtical law, it is not to be granted till within fourteen days of an inteſtate's death: but the reſt of the Court denied this propoſition, for relations which are but fictions in law, ſhall not, they ſaid, deveſt any right veſted in a ſtranger *meſne* between the inteſtate's death and the adminiſtration. The ſtatute, it is true, was made for the benefit of landlords, and to prevent the tenant's ſetting up a ſham execution to defeat him of the rent. He has ſtill the ſame remedy that he had before, and if he will have the additional remedy, he muſt make himſelf capable of it, which the adminiſtrator here could not. He could not demand the rent, it not being certain that he would be adminiſtrator, for the ordinary might refuſe, and the ſheriff is not obliged to wait and ſee if any body comes and demands the rent. He cannot take notice what arrears there are; but if the landlord comes and acquaints him with it, then, and not till then, is he obliged to ſee the year's rent ſatisfied before removal of the goods. If it ſhould be otherwiſe, it would be in the power of him that is entitled to adminiſtration to defeat the plaintiff of his execution; for ſuppoſe he never takes adminiſtration, muſt the execution ſtand ſtill? If the landlord himſelf had not demanded before removal, he had been too late: here was no landlord at all, ſo that there could be no demand, and it is now too late to aſk it.

Ibid & 214. Therefore, notice to the ſheriff is neceſſary in order to ſubject him to an action for removing the goods before a

2 Wilſ. 141. year's rent be paid: for neither a plaintiff nor defendant has any right to go upon the premiſſes and the law gives the entry to the ſheriff only by virtue of the execution, but after he has notice of rent being due to the landlord, he cannot remove the goods before he has ſatisfied the landlord

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one year's rent. The landlord ſhall have the like benefit of diſtreſs for one year's rent as if there had been no execution at all: unleſs the rent be paid, the ſheriff muſt quit, and if he do not quit, a ſpecial action on the caſe lies againſt him after notice of the rent due.—The want of alledging notice, however, is helped by the verdict. 1 Str. 214.

The landlord's rent muſt be paid without any deduction; the ſheriff therefore cannot claim poundage of him. *Ibid.* 643.

The remedy, as before obſerved, is for one year's rent and no more. Therefore, where there are two executions the landlord cannot have a year's rent on each: for the intent of the Act was only to continue a lien as to one year, and to puniſh him for his laches, if he let more run in arrear. 2 Str. 1024.

If the goods ſeized be not ſold or removed by the ſheriff, ſo as to transfer the property therein, but the defendant pays the debt and coſts, the landlord, though he has given notice and demanded the rent, is not entitled in ſuch caſe.

A bill of ſale was made by the ſheriff, and it was held to be a removal of the goods taken by writ of *fieri facias*. Bam. 211.

If an extent comes in, the landlord cannot claim his rent although a diſtreſs be taken the day before.—So, on extent or an outlawry, although he had diſtrained three days previous to the entry, and motion be made to be paid under the ſtatute; but this is denied. If a diſtreſs be taken *October* 29, and an extent dated *November* 4, and corn, *&c.* ſeized, the landlord cannot have his rent, for no property was deveſted by the diſtreſs, and they were in the landlord's hands by way of pledge: but an attachment was refuſed, although it was a contempt to oppoſe the extent. Imp. Sheriff. 170, &c.

An immediate extent againſt the king's debtor teſted after a diſtreſs taken for rent juſtly due to the landlord, with notice to the tenant being the king's debtor, and appraiſement of the goods and chattels, but before ſale, ſhall prevail againſt the diſtreſs. Park. R. 112.

A diſtinction has been taken between proceedings at the ſuit and for the benefit of the crown, and an outlawry in a civil ſuit: and in the latter inſtance it has been ruled that "the landlord ought to be ſatisfied a year's rent, becauſe a "*capias utlagatum* at the ſuit of the party is to be conſi- "dered only as a private execution," but if the outlawry be reverſed, it would be otherwiſe. Imb. Sheriff. 171. 7 T. R. 264.

1 Atk. 103. A commiſſion of bankrupt is not conſidered as an execution *quoad hoc:* therefore, as a landlord may on the one hand diſtrain for his whole rent after aſſignment or ſale by the aſſignees, if the goods are not removed, ſo on the other hand, if he ſuffer the aſſignees to ſell off the goods, he is not entitled to his rent, but muſt come in *pro rata* with the other creditors under the commiſſion.

2 Str. 787. The ground landlord of a houſe, in which an under leſſee dwelt, againſt whom an execution was ſued out, is not within the ſtatute, which extends only to the immediate landlord.

Doug. 665. In an action againſt the ſheriff for taking goods without leaving a year's rent, the declaration need not ſtate all the particulars of the demiſe: but if it do, and they are not proved as ſtated, there ſhall be a nonſuit.

2 Wilſ. 141. The landlord is not always driven to this action for his remedy, for there is a ſhorter way, by motion to the Court, that he may have reſtitution to the amount of the goods the ſheriff has ſold; as in the principal caſe, in which the bailiff became a wrong-doer immediately after he had notice of rent being due to the landlord.

2 Sell. Pract. 570. Inſtead of bringing an action againſt the ſheriff, *&c.* when the goods are ſold after notice, the beſt way for the landlord is to move the Court, that he may have reſtitution to the amount of the goods which the ſheriff has ſold, if they amount to leſs than a year's rent, or if they amount to more, then to have ſo much as will ſatisfy a year's rent.

Bar. 199. Motion was to have rent paid out of the money levied. On ſhewing cauſe it appeared that the ſheriff's warrant on the execution, after it was ſealed, had been altered, and a new bailiff's name inſerted: *Per Cur.* The warrant being altered, no goods are taken in execution thereby. Let the bailiff and attorney privy to the alteration, ſhew cauſe why an attachment ſhould not iſſue againſt them.

SECTION III. *The Landlord's Remedy on the Statute* 11 Geo. 2. c. 19. *touching Goods fraudulently carried off the Premiſſes.*

The ſtatute 11 *G.* 2. *c.* 19. *ſ.* 1. enacts that "In caſe "any tenant or tenants, leſſee or leſſees, for life or lives, "term of years, at will, ſufferance, or otherwiſe, of any "meſſuages, lands, tenements, or hereditaments, upon the "demiſe

" demiſe or holding whereof any rent is reſerved, ſhall " fraudulently or claudeſtinely convey away or carry off or " from ſuch premiſſes, his, her, or their goods or chattels, " to prevent the landlord or leſſor, landlords or leſſors from " diſtraining the ſame for arrears of rent ſo reſerved, it ſhall " be lawful to or for every landlord or leſſor, landlords or " leſſors, or any perſon or perſons by him, her, or them " for that purpoſe lawfully impowered, within the ſpace of " thirty days next enſuing ſuch conveying away or carrying " off ſuch goods or chattels, to take and ſeize ſuch goods " and chattels wherever the ſame ſhall be found, as a " diſtreſs for the ſaid arrears of rent; and the ſame to ſell " or otherwiſe diſpoſe of, in ſuch manner as if the ſaid " goods and chattels had actually been diſtrained by ſuch " leſſor or landlord, leſſors or landlords, in and upon ſuch " premiſſes for ſuch arrears of rent."

Sect. 2. " Provided always that no landlord or leſſor, " or other perſon intitled to ſuch arrears of rent, ſhall " take or ſeize any ſuch goods or chattels for the ſame " which ſhall be ſold *bonâ fide*, and for a valuable conſider- " ation, before ſuch ſeizure made, to any perſon or perſons " not privy to ſuch fraud as aforeſaid."

By Sect. 3. " To deter tenants from ſuch fraudulent con- " veying away their goods and chattels, and others from " wilfully aiding or aſſiſting therein, or concealing the " ſame, it is enacted that if any perſon or perſons ſhall wil- " fully and knowingly aid and aſſiſt any ſuch tenant or leſſee " in ſuch fraudulent conveying away or carrying off of any " part of his or her goods or chattels, or in concealing the " ſame, all and every perſon and perſons ſo offending ſhall " forfeit and pay to the landlord or landlords, leſſor or leſſors, " from whoſe eſtate ſuch goods and chattels were fraudulently " carried off as aforeſaid, double the value of the goods by " him, her, or them reſpectively carried off or concealed as " aforeſaid; to be recovered by action of debt in any of his " Majeſty's Courts of Record at *Weſtminſter*, or in the Courts " of Seſſion in the counties palatine of *Cheſter*, *Lancaſter*, or " *Durham*, reſpectively, or in the Courts of Grand Seſſions " in *Wales*, wherein no eſſoin, protection, or wager of law " ſhall be allowed, nor more than one imparlance."

Sect. 4. " Provided always, that where the goods and

" chattels ſo fraudulently carried off or concealed ſhall not " exceed the value of 50*l.* it ſhall be lawful for the land- " lord or landlords, from whoſe eſtate ſuch goods and " chattels were removed, his, her, or their bailiff, ſervant, " or agent, in his, her, or their behalf, to exhibit a com- " plaint in writing againſt ſuch offender or offenders, before " two or more juſtices of the peace of the ſame county, " riding, or diviſion of ſuch county, reſiding near the place " whence ſuch goods and chattels were removed, or near " the place where the ſame were found, not being intereſted " in the lands or tenements whence ſuch goods were re- " moved; who may ſummon the parties concerned, exa- " mine the fact, and all proper witneſſes, upon oath, or if " any ſuch witneſs be one of the people called *Quakers*, " upon affirmation required by law; and in a ſummary " way determine, whether ſuch perſon or perſons be guilty " of the offence with which he or they are charged; and to " enquire in like manner of the value of the goods and " chattels by him, her, or them reſpectively ſo fraudulently " carried off or concealed as aforeſaid; and upon full proof " of the offence, by order under their hands and ſeals, the " ſaid juſtices of the peace may and ſhall adjudge the of- " fender or offenders to pay double the value of the ſaid " goods and chattels to ſuch landlord or landlords, his, her, " or their bailiff, ſervant, or agent, at ſuch time as ſuch " juſtices ſhall appoint: and in caſe the offender or offen- " ders, having notice of ſuch order, ſhall refuſe or neglect " ſo to do, may and ſhall, by warrant under their hands " and ſeals, levy the ſame by diſtreſs and ſale of the goods " and chattels of the offender or offenders; and for want of " ſuch diſtreſs, may commit the offender or offenders to " the houſe of correction, there to be kept to hard labour, " without bail or mainprize, for the ſpace of ſix months, " unleſs the money ſo ordered to be paid as aforeſaid ſhall " be ſooner ſatisfied." Sect. 5. " Provided always, that it " ſhall be lawful for any perſon who thinks himſelf ag- " grieved by ſuch order of the ſaid two juſtices, to appeal " to the juſtices of the peace at the next General or Quar- " ter Seſſions to be held for the ſame county, riding, or " diviſion of ſuch county, who may and ſhall hear and de- " termine ſuch appeal, and give ſuch coſts to either party

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" as they ſhall think reaſonable, whoſe determination " therein ſhall be final."—Sect. 6. " Provided alſo, that " where the party appealing ſhall enter into a recognizance " with one or two ſufficient ſurety or ſureties in double the " ſum ſo ordered to be paid, with condition to appear at " ſuch General or Quarter Seſſions, the order of the ſaid " two juſtices ſhall not be executed againſt him in the " mean time."

By Sect. 7. it is further enacted, " That where any goods " or chattels fraudulently or clandeſtinely conveyed or " carried away by any tenant or tenants, leſſee or leſſees, " his, her, or their ſervant or ſervants, agent or agents, or " other perſon or perſons aiding or aſſiſting therein, ſhall " be put, placed, or kept in any houſe, barn, ſtable, out-" houſe, yard, cloſe or place locked up, faſtened, or other-" wiſe ſecured, ſo as to prevent ſuch goods or chattels from " being taken and ſeized as a diſtreſs for arrears of rent, it " ſhall be lawful for the landlord or landlords, leſſor or " leſſors, his, her, or their ſteward, bailiff, receiver, or " other perſon or perſons impowered to take and ſeize, as " a diſtreſs for rent, ſuch goods and chattels (firſt calling to " his, her, or their aſſiſtance the conſtable, headborough, " borſholder, or other peace officer of the hundred, bo-" rough, pariſh, diſtrict, or place, where the ſame ſhall be " ſuſpected to be concealed, who are hereby required to aid " and aſſiſt therein; and in caſe of a dwelling-houſe, oath " being firſt made before ſome Juſtice of the peace of a rea-" ſonable ground to ſuſpect that ſuch goods or chattels are " therein) in the day-time, to break open and enter into " ſuch houſe, barn, ſtable, out-houſe, yard, cloſe, and " place, and to take and ſeize ſuch goods and chattels for " the ſaid arrears of rent, as he, ſhe, or they might have " done by virtue of this or any former act, if ſuch goods " and chattels had been put in any open field or place."

In order to juſtify the landlord in ſeizing, under this ſta- 3 Eſp. R. 16.
tute, within thirty days, goods removed off the premiſſes, as a diſtreſs for rent wherever found, the removal muſt have taken place after the rent became due, and muſt have been ſecret, and not open and in the face of day, as in ſuch caſe

the removal could not be ſaid to be clandeſtine, within the meaning of the ſtatute.

3 T. R. 645, 6. An averment in a declaration in an action of debt on Sect. 3. of this ſtatute, to recover double the value of goods removed in order to prevent a diſtreſs, that "a cer-"tain ſum was due for rent" before the goods were removed, need not be preciſely proved as laid: for whether 5*l.* or any other ſum were in arrear is perfectly immaterial; the damages not being to be meaſured by the quantity of rent, but by the value of the goods removed. Beſides, the giſt of the action is the fraudulent removal of the goods from the premiſſes in order to defeat the diſtreſs; it was therefore immaterial to the defendants whether one ſum or another were due for rent, for in either caſe they are guilty of a tort. Where the variance, therefore, does not conſiſt in any part of the contract, but in an averment of matter ſubſequent to the contract, ſuch averment being merely a matter of inducement to the action, need not be preciſely proved.

Ibid. So the notice of diſtreſs may be abandoned; for a party may diſtrain for rent and avow for fealty.

CHAPTER

CHAPTER XVIII.

Of the Remedies for Tenants againſt Landlords.

SECTION I. *Of the Replevin.*
SECTION II. *Of the Action.*
SECTION III. *Of the Judgment, &c.*

SECTION I. *By Action of Replevin.*

THE action of replevin is founded upon, and is the regular way of conteſting the validity of a diſtreſs: being a re-delivery of the pledge, or thing taken in diſtreſs, to the owner, by the ſheriff or his deputy; upon the owner giving ſecurity to try the right of the diſtreſs, and to reſtore it, if the right be adjudged againſt him: after which the diſtrainer may keep it, till tender made of ſufficient amends, but muſt then re-deliver it to the owner. 3 Bl. Com. 147.

In this writ or action, both the plaintiff and defendant are called actors; the plaintiff ſuing for damages, and the defendant or avowant to have a return of the goods or cattle. Bac. Abr. tit. Replevin, &c. (A.)

Replevin is an action founded on the right, and different from treſpaſs, or detinue: and it is now held, that as no lands can be recovered in this action, it cannot, with any propriety, be conſidered as a real action, though the title of lands may incidentally come in queſtion, as it may do in an action of treſpaſs or even debt, which are actions merely perſonal. *Ibid.*

In our account of this action, we ſhall endeavour to confine our notice of it as it regards diſtreſs for rent, or cattle damage feaſant; the ſervices of copyholders, *&c.* being out of the ſcope of our conſideration.

This remedy may be ſaid to be of common right: for if a man by his deed grant a rent with a clauſe of diſtreſs, and grant further that the party ſhall keep the goods diſtrained againſt *Who may have Replevin.* Co. Lit. 145. *b.*

againſt gages and pledges, until the rent be paid, yet ſhall the ſheriff replevy the goods diſtrained; for it is againſt the nature of ſuch a diſtreſs to be irrepleviſable, and by ſuch an invention the current of replevins would be overthrown to the hindrance of the commonwealth; and therefore it was diſallowed by the whole Court, and awarded that the defendant ſhould gage deliverance [that is, engage to deliver the diſtreſs to the owner on his pledging to try the diſtrainer's right thereto] or elſe go to priſon.

Ibid. It is a general rule that the plaintiff ought to have the property of the goods in him at the time of the taking: but there are two kinds of properties; a general property, which every abſolute owner hath, and a ſpecial property, as goods pledged or taken to manure his lands, or the like, and of either of theſe replevin lies.

Bull. N. P. 53. An executor may have a replevin for goods taken in the life-time of his teſtator.

Ibid. Bac. Abr. tit. Replevin, &c. (G.) So, if the cattle or other goods of a feme ſole be taken, and ſhe afterwards intermarry, the huſband alone may have replevin: and if they join, judgment will not be arreſted after verdict, becauſe the Court will preſume them jointly intereſted, (as they may be, if a diſtreſs be taken of goods of which a man and woman were joint-tenants, and afterwards intermarry); the avowry admitting the property to be in the manner it is laid.—But in replevying goods which a wife holds as executrix, this action cannot be brought by either of them ſingly, but they muſt be joined.

Co. Lit. 145. *b.* If the goods of ſeveral perſons be taken they cannot join in replevin, but every one muſt have a ſeveral action.

Cro. Eliz. 530. Salk. 390. Bull N. P. 53. Tenants in common, therefore, ſhould not join.—But co-parceners ſhould join, for they make but one heir: and for the ſame reaſon, ſo ſhould joint-tenants.

Againſt whom 2 Roll. 431. l. 5. F. N. B. 19. G. Replevin lies againſt him who takes the goods, and alſo againſt him who commands the taking; or againſt both.

So it lies againſt him who takes damage feaſant, if he detains after amends tendered.

Replevin lies for what. Replevin lies for whatever is capable of being diſtrained, and for nothing elſe; for the action is the remedy of the party whoſe goods are diſtrained.

Bac. Abr. tit. Replevin, &c. (F.) Replevin, therefore, does not lie of things *feræ naturæ*; nor

nor of deeds or charters; nor of money; nor of leather made into ſhoes.

But if a mare in foal, a cow in calf, *&c.* be diſtrained, and they happen to bring forth their young whilſt they are in cuſtody of the diſtrainer, a replevin lies of the foal, calf, *&c.* *Ibid.*

Replevin lies of a ſhip: ſo, of the ſails of a ſhip. *Ibid.*

But no replevin lies of goods taken beyond the ſeas, though brought hither by the defendant afterwards.

In thoſe caſes in which replevin does not lie, the party may bring an action of detinue to recover the deeds, goods, *&c. in ſpecie.* *Ibid. a.*

Replevin may be made either by original writ of replevin at common law, or by plaint by the ſtatute of *Marlbridge* 52 *H.* 3. *c.* 21. *The ſeveral kinds of Replevin.*

Formerly, when the party diſtrained upon intended to diſpute the right of the diſtreſs, he had no other proceſs by the common law than by a writ of replevin, *replegiari facias*, which iſſued out of Chancery, commanding the ſheriff to deliver the diſtreſs to the owner, and afterwards to do juſtice in reſpect of the matter in diſpute in his own County Court. But this being a tedious method of proceeding, the beaſts and other goods were long detained from the owner, to his great loſs and damage.

The ſtatute of *Marlbridge*, therefore, directs, "That (without ſuing a writ out of the Chancery) if the beaſts of any perſon be taken and wrongfully with-holden, the ſheriff, after complaint made to him thereof, may deliver them without let or gainſaying of him that took the beaſts, if they were taken out of liberties; and if they were taken within liberties, and the bailiffs of the liberty will not deliver them, then the ſheriff, for default of thoſe bailiffs, ſhall cauſe them to be delivered."

Alſo, for the more ſpeedy delivery of cattle taken by way of diſtreſs, the ſtatute of the 1ſt of *Philip* and *Mary*, *c.* 12. provides, that the ſheriff ſhall make, at leaſt, four deputies in each county, dwelling not above twelve miles from each other, for the ſole purpoſe of making replevins, under a penalty of 5*l.* for every month ſuch deputies ſhall be omitted to be provided.

When

When any man's goods, therefore, are diſtrained or impounded, he may, upon application for the purpoſe to one of theſe deputies, upon giving pledges to return the diſtreſs if judgment be againſt him, have a replevin, by which his goods will be reſtored to his poſſeſſion.

Bac. Abr. tit. Replevin, &c. (C.)

But when an Act of Parliament orders a diſtreſs and ſale of goods, it is in the nature of an execution, and replevin does not lie.

Out of what Courts Replevin iſſues. Bull. N. P. 52.

The ſheriff, upon plaint made to him without writ, may either by parol or precept command his bailiff to deliver the goods, that is, to make replevin of them; and by the words in the ſtatute of *Marlbridge*, "after complaint made to him "thereof," he may take a plaint out of the County Court and make replevin preſently, which he is to enter in the Court.

2 Bl. Com. 149.

By this ſtatute, the ſheriff may hold plea in the County Court on replevin by plaint, whatever may be the value of the ſubject in diſpute, although in other actions he ſhall only hold plea where the matter is under 40*s.* value; and the plaint may be taken at any time, as well out of, as in Court. But if the taking be in right of the Crown, or if any thing touching the freehold come in queſtion, or antient demeſne be pleaded, or if the diſtrainer claim property in the goods, and on a writ *de proprietate probanda*, they be found to be his, the ſheriff can proceed no further, but muſt return the proceedings into the Court of K. B. or C. P. to be there, if thought adviſeable, finally determined.

Co. Lit. 145. *b.* 2 Cromp. Pract. 227.

But either party may, by the writs of *pone*, and *recordari facias*, remove a replevin to theſe ſuperior courts: the plaintiff at his election, the defendant upon reaſonable cauſe. It is therefore uſual to carry it up, in the firſt inſtance, to *Weſtminſter Hall*.

2 Inſt. 312.

The writ of replevin iſſues out of the Court of Chancery, and is returnable only into the Courts of King's Bench, Common Pleas, the Court of the Cinque Ports, and the County Court.

2 Sell. Pract. 244.

If the ſheriff makes replevin, he need not return the writ; but if he does, he ought to return the cauſe; and if he do not, an attachment lies againſt him to the coroners, commanding

commanding them to attach the ſheriff for his contempt, and in the interim make replevin.

Proceedings in replevin cannot be carried on in the Hundred Court, Court Baron, or any other Court claiming a juriſdiction over ſuch proceedings by preſcription; unleſs (*ſed quare*) by proceſs of the Court after a plaint entered. But it lies by plaint in *London*. 1 Ld. Raym. 219. 2 Lil. Reg. 557. Bro. R. 3.

If the diſtreſs be made in a franchiſe or bailiwick, the ſheriff is to direct the replevin to the bailiff thereof to deliver the goods upon pledges, and if he make no anſwer, or return that he will make no deliverance, or the like, then the ſheriff may enter into the liberty and make deliverance; and if the diſtreſs be taken without the liberty and impounded within the liberty, then the ſheriff may enter and make deliverance, and need not firſt make out a warrant to the ſheriff of the liberty. 2 Inſt. 149, 194.

But if a man were to preſume to replevy goods, ſeized in order to condemnation, it would be a contempt of the Court of Exchequer, for which an attachment would be granted inſtantly. Anſtr. 212.

The action of replevin is of two ſorts: 1. in the *detinet*; 2. in the *detinuit*. Where the party has had his goods redelivered to him by the ſheriff upon a writ of replevin, or upon a plaint levied before him, the action is in the *detinuit*, "wherefore he detained the goods," *&c.* but where the ſheriff has not made ſuch replevin, but the diſtrainer ſtill keeps poſſeſſion, the action is in the *detinet*, "wherefore "he detains the goods," *&c.*—The advantage that the plaintiff has in bringing an action of replevin in the *detinet*, inſtead of an action of treſpaſs *de bonis aſportatis*, is, that he can oblige the defendant to re-deliver the goods to him immediately, in caſe, upon making his avowry, they appear to be repleviſable: but as he may more ſpeedily have them delivered immediately after they are diſtrained by application to the ſheriff, the action in the *detinet* has fallen into diſuſe, and is never brought, unleſs the diſtrainer has eloined the goods ſo that the ſheriff cannot get at them to make replevin; whereupon, after avowry made, the plaintiff may pray that the defendant gage deliverance; or he 2 Sell. Prac. 141.

may

may act as mentioned under title *the writ of Witherman*, which *vide poſtea*.

The method of proceeding uſually adopted now is by plaint, that by writ being generally diſuſed.

Bac. Abr. tit. Replevin, &c. (C.)

The ſheriff is obliged to grant replevins in all ſuch caſes as are allowed of by law, and the officer who takes the goods by virtue of a replevin, iſſuing for what cauſe ſoever, is not liable to an action of treſpaſs; unleſs the party in whoſe poſſeſſion the goods were claim property therein: and in all caſes of miſbehaviour by the ſheriff or other officers in relation to replevins, they are ſubject to the controul of the king's ſuperior courts, and puniſhable by attachment for ſuch miſbehaviour.

1 Eſp. R. 91.

Where a tenant has, on coming into poſſeſſion under an aſſignment, had notice that the leaſe was held under any particular perſon to whom the former tenant has paid rent, the title of this perſon cannot be conteſted in an action of replevin.

Of the Pledges Bac. Abr. *ut ante.*

The ſheriff, when, upon complaint made to him, he makes replevin, muſt take two kinds of pledges: 1ſt, by the common law, that the party replevying will purſue his action againſt the diſtrainer, for which purpoſe he puts in *plegii de proſequendo*, or pledges to proſecute at common law; and 2dly, by ſtat. 13 *E.* 1. *c.* 1. that if the right be determined againſt him he will return the diſtreſs again; for which purpoſe he is bound to find *plegii de retorno habendo*, or pledges to make return, if it be ſo adjudged.

Co. Lit. 145. 2 Inſt. 340.

The pledges taken muſt not only be ſufficient in eſtate, *viz.* capable to anſwer in value, but likewiſe ſufficient in law and under no incapacity; and therefore infants, *&c.* are not to be taken as pledges, neither are any perſons politic or bodies corporate. But the ſufficiency of theſe pledges is diſcretionary, and if the ſheriff return inſufficient pledges, he ſhall anſwer for the price of the goods himſelf; for inſufficient pledges are as no pledges.—The pledges when taken muſt be recorded in the County Court.

2 Sell. Pract. 146.

Upon plaint being made, therefore, and pledges found, which is done at the ſheriff's office, the ſheriff or one of his deputies, by ſtat. 1 *E.* 2. *P. & M.* is to make replevin of

of the goods or cattle diſtrained, which is done by granting a warrant.

There is no particular time when the replevin muſt be made, as the diſtreſs cannot be diſpoſed of, but muſt be only kept as a pledge.

In replevin, a bond inſtead of pledges, taken by a ſheriff to proſecute the action with effect for wrongfully taking the plaintiff's gelding, and to make return thereof if return ſhould be adjudged, is good: but he cannot take gage inſtead of pledges. 1 Ld. Raym. 278.

If the ſheriff neglect to take a replevin-bond, the party injured may have his action againſt him; but it is not a contempt of Court for which they will grant an attachment. 2 T. R. 617.

If upon ſuch bond the plaintiff in replevin do not enter his plaint in the County Court, the bond will be forfeited: ſo, if afterwards he do not proceed in the proſecution; or if he be nonſuit, or has a verdict againſt him. Com. Dig. tit. Replevin (D.)

But if the plaintiff in replevin enters his plaint, and afterwards is reſtrained by injunction out of Chancery till his death, whereby his plaint abates, the bond will not be forfeited. *Ibid.* Carth. 519.

The bond may be aſſigned, if the plaintiff in replevin do not appear at the County Court *next* after giving the bond: and he may ſue on the bond as aſſignee of the ſheriff in the ſuperior Courts, though the replevin be not removed out of the County Court. 5 T. R. 195.

But though, if the diſtreſs be not for rent, the bond is not aſſignable, yet the party may apply to the ſheriff for the bond, and to be at liberty to ſue in his name.

How to make Replevin where Diſtreſs is for Rent.

If the tenant means to replevy, he muſt, within five days after notice of the diſtreſs, take with him two houſe-keepers living in the city or county where the diſtreſs was made, and go to the ſheriff's office of ſuch city or county, where he muſt enter into a bond with the two houſe-keepers, as ſureties in double the value of the goods diſtrained, according to ſtat. 11 *G.* 2. upon which the ſheriff will direct a precept to one of his bailiffs, and the poſſeſſion of the goods 2 Sell. Pract 260

goods will be reſtored to the tenant to abide the event of the ſuit in replevin.

Ibid. It has before been obſerved, that upon making replevin, two kinds of ſecurities were at common law taken by the ſheriff, *viz.* the one for proſecuting the ſuit; the other, for returning the goods if a return ſhould be awarded. The firſt were merely nominal (*John Doe* and *Richard Roe*,) but the ſecond ſhould be real reſponſible perſons. Sheriffs however, gradually became remiſs in their duty, and often neglected taking theſe pledges *pro retorno habendo*; or, if any were taken, for the moſt part they were found to be indigent and irreſponſible people.

The ſtat. 11 G. 2. c. 19. s. 23. therefore, for the better ſecuring the payment of rents and preventing frauds by tenants, enacts "That to prevent vexatious replevins of diſtreſſes taken for *rent*, all ſheriffs and other officers having authority to grant replevins, may and ſhall, in every replevin of a diſtreſs for rent, take in their own names from the plaintiff and two reſponſible perſons as ſureties, a bond in double the value of the goods diſtrained (ſuch value to be aſcertained by the oath of one or more credible witneſs or witneſſes not intereſted in the goods or diſtreſs, which oath the perſon granting ſuch replevin is hereby authorized and required to adminiſter,) and conditioned for proſecuting the ſuit with effect and without delay, and for duly returning the goods and chattels diſtrained, in caſe a return ſhall be awarded before any deliverance be made of the diſtreſs."

For the further protection of landlords and by way of putting the remedy into their own hands, it is alſo ordered by the ſame ſtatute, "That ſuch ſheriff or other officer as aforeſaid, taking any ſuch bond, ſhall at the requeſt and coſts of the avowant or perſon making conuſance, aſſign ſuch bond to the avowant, or perſon aforeſaid, by indorſing the ſame, and atteſting it under his hand and ſeal, in the preſence of two or more credible witneſſes; which may be done without any ſtamp, provided the aſſignment ſo indorſed be duly ſtamped before any action be brought thereon: and if the bond ſo taken and aſſigned be forfeited, the avowant or the perſon making conuſance, may bring an action, and recover, thereupon in his own name; and the

Court where ſuch action ſhall be brought may, by a rule of the ſame Court, give ſuch relief to the parties, upon ſuch bond, as may be agreeable to juſtice and reaſon, and ſuch rule ſhall have the nature and effect of a defeazance to ſuch bond."

SECTION II. *Of the Writs in Replevin.*

The original writ in replevin iſſues out of Chancery, and neither that nor the *alias* replevin are returnable, but are only in the nature of a *juſticies* to empower the ſheriff to hold plea in his County Court, where a day is given to the parties. But the *pluries* replevin is always with this clauſe, "or ſhew "cauſe before us," and is a returnable proceſs. Bac. Abr. tit. Replevin, &c. (E.)

The *pluries* replevin ſuperſedes the proceedings of the ſheriff, and the proceedings are upon that, and not upon the plaint as they are when that is removed by *recordari:* and though there is no ſummons in the writ, yet it gives a good day to the defendant to appear, and if he do not appear, a *pone* iſſues, and then a *capias*. *Ibid.*

Proceſs of outlawry lies upon the *capias in withernam*, which iſſues upon the ſheriff's return of *averia elongata*, upon the *pluries;* and upon the Sheriff's ſpecial return of *nulla bona* on the *withernam*, there ſhall go a *capias* againſt the perſon, and ſo to outlawry. *Ibid.*

Capias and proceſs of outlawry in replevin were given by ſtat. 25. *E.* 3. *c.* 17.

If on the *pluries* replevin the ſheriff return that the cattle are eloigned to places unknown, *&c.* ſo that he cannot deliver them to the plaintiff, then ſhall iſſue a withernam [from the *Saxon* words *weder*, other, and *naam*, diſtreſs, ſignifying another diſtreſs inſtead of the former which was eloigned that is removed,] directed to the ſheriff, commanding him to take the cattle or goods of the defendant, and detain them till the cattle or goods diſtrained are reſtored to the plaintiff; and if upon the firſt withernam a *nihil* be returned, then an *alias* and *pluries* replevin ſhall iſſue, and ſo to a *capias* and *exigent*. *Of the Withernam.* Bac. Abr. *ut ante*, (E. 2.)

The writ of withernam ought to rehearſe the cauſe which the ſheriff returns, for which he cannot replevy the cattle or goods; ſo that it does not lie upon a bare ſuggeſtion that the beaſts are eloigned, *&c.*—If upon the withernam, the *Ibid.*

cattle are reſtored to the party who eloigned them, yet he ſhall pay a fine for his contempt.

Ibid. The withernam is but meſne proceſs, and cannot be an execution, becauſe it is granted before judgment.

Ibid. Cattle taken in withernam may be worked, or if cows, may be milked; for the party has them in lieu of his own: and as the party is to have the uſe of the cattle, he is not to have any allowance or payment for the expences he has been at in maintaining them.

Ibid. In *ſcire facias* againſt an executor on a judgment *de retorno habendo* againſt his teſtator for a cow, but which was not executed, it was held that the plaintiff ſhould have execution, for the defendant could not be prejudiced; inaſmuch as, if the ſheriff return *averia elongata*, he ſhall not have a withernam but of the goods of the teſtator; or if there are no goods of the teſtator, the ſheriff can take nothing, but ſhall return *nulla bona*, and then the plaintiff hath his ordinary way to charge the defendant, if he hath made a *devaſtavit*; and it was adjudged for the plaintiff.

Ibid. If, upon an *elongata* returned, the defendant's cattle are taken in withernam, yet upon the defendant's appearance, and pleading *non cepit*, or claiming property, the defendant ſhall have his cattle again, and if they are eloigned, a withernam againſt the plaintiff: for if the property or taking be in queſtion, there is no reaſon that the plaintiff ſhould have the defendant's cattle.—Both the plaintiff and defendant, indeed, may, it ſeems, have a withernam.

Of Writ of ſecond Deliverance. Bac. Abr. *ut ante.* (E. 3.) At common law, if the plaintiff had been nonſuited either before or after verdict, the defendant who diſtrained ſhould have had return, but not irrepleviſable; [this ſignifies, that ought not to be replevied, or ſet at large upon ſureties;] ſo that the plaintiff after nonſuit might have had as many replevins as he choſe. To remedy which evil the ſtat. *Weſtm.* 2. (13 *E.* 1. *ſt.* 1.) *c.* 2. reſtrains the plaintiff from any more replevins after nonſuit, but gives a writ of ſecond deliverance: and if in ſuch writ the plaintiff be nonſuited, or if the plea be diſcontinued, or the writ abate, or if he prevail not in his ſuit, return irrepleviſable ſhall be granted.

Ibid. If defendant in replevin has return awarded upon non-

ſuit

ſuit of the plaintiff, upon which he ſues a writ *de ret hab.* and the ſheriff returns *averia elongata per querentem*, and upon this a withernam is awarded, and upon the withernam, the defendant has *tota catalla* to him delivered of the goods of the plaintiff, and thereupon the plaintiff ſues a ſecond deliverance; he ſhall ſue it for the firſt diſtreſs taken, and not for the withernam, as appears by the nature and form of the writ of ſecond deliverance.

Retorno habendo awarded to the ſheriff, after a writ of ſecond deliverance prayed by the plaintiff, is a *ſuperſedeas* to the *ret. hab.* and cloſes the ſheriff's hand from making any return thereon.—If the ſheriff will not execute the writ of ſecond deliverance, the party has his remedy againſt him. *Ibid.*

This ſtat. of *Weſtm.* 2. gives the writ of ſecond deliverance out of the ſame Court whence the firſt replevin was granted, and a man cannot have it elſewhere; for if he could, then he might vary from the place limited, as to this, by the ſtatute. But though the writ cannot vary from the firſt in year, day, place, or number of beaſts, yet if the firſt writ was of a heifer, the ſecond may be of a cow, as by preſumption it may in that diſtance of time grow to ſuch.

Where the defendant had avowed and plaintiff being nonſuited brought this writ, it was held that though the writ be a *ſuperſedeas* to the *ret. hab.* it is not ſo to the writ of enquiry of damages; for theſe damages are not for the thing avowed for, but are given by the ſtat. 21 *H.* 8. *c.* 19. as a compenſation for the expence and trouble the avowant has been at.

In error on a ſecond deliverance, the writ muſt be certified; and if it vary in ſubſtance from the declaration in replevin it ſhall be abated. *Ibid.*

Upon a nonſuit either before or after evidence, this writ will lie, becauſe there is no determination of the matter, and there a writ of ſecond deliverance lies to bring the matter in queſtion. *Ibid.*

But no ſecond deliverance lies after a judgment upon a demurrer, or after a verdict, or confeſſion of the avowry; but in all theſe caſes, judgment muſt be entered with a return irrepleviſable, for in the caſe of a demurrer and verdict, the matter is determined by the law, and in that of a confeſſion, it is determined by the confeſſion of the party. *Ibid.*

Note. In an avowry for rent, the writ of ſecond deliverance is taken away by ſtat. 17 *Car.* 2. *c.* 7.

Yet if the plaintiff in replevin be nonſuited for want of delivering a declaration, which happened through any cauſe that would have entitled him to a writ of ſecond deliverance, as ſickneſs of the perſon employed, *&c.* the Court will order the defendant to accept of a declaration on payment of coſts; elſe the plaintiff would be remedileſs, the writ of ſecond deliverance being taken away by the 17th *C.* 2. *c.* 7.

Of Writ de proprietate probandâ. Bac. Abr. *ut ante.* (E. 4.)

The writ *de proprietate probanda* iſſues out of Chancery, or K. B. or C. P. When it iſſues out of Chancery, it is an original, and goes upon the ſheriff's return to the *alias* replevin; when out of either of the other Courts, it is judicial and granted on the return of the *pluries*, for the *pluries* is returnable only there, the original and *alias* giving no day, but being merely vicontiel.

If the defendant in replevin claim property, the ſheriff cannot proceed, for property muſt be tried by writ. In this caſe, therefore, the plaintiff may have the writ *de proprietate probanda* to the ſheriff, who is to give notice to the parties of the time and place of executing it, for it is an inqueſt of office. If it be found for the plaintiff, the ſheriff is to make deliverance; if for the defendant, then he is to proceed no further, but being an inqueſt of office, the plaintiff may notwithſtanding have a replevin to the ſheriff, and if he return the claim of property, yet it ſhall proceed in C. P. where the property ſhall be put in iſſue and finally tried.—None but he who is party to the replevin ſhall have the writ *de prop. prob.*

Ibid. The ſheriff is to return the claim of property on the *pluries*, before which time the writ *de prop. prob.* does not iſſue, for it recites the *pluries*.

Ibid. If the defendant in replevin claim property, the plaintiff may have the writ *de prop. prob.* without continuance of the replevin, though it be two or three years after, for by the claim of property the firſt ſuit is determined.

If the plaintiff has property and omits to claim it before the ſheriff, he may notwithſtanding plead property in himſelf, or in a ſtranger, either in abatement or bar.

If

If it be notified to him, that comes in aid of the ſheriff or his officer, that claim of property is made, he at his peril ought to deſiſt, for if he take them away, he will be a treſpaſſer *ab initio*. *Ibid.*

A man cannot claim property in the County Court by his bailiff or ſervant, for if the claim be falſe, a fine will be impoſed for the contempt: but in K. B. one may make conuſance and claim property by a bailiff, for there the bailiff is not liable to a fine. *Ibid.*

Of Writ de retorno habendo. Bac. Abr. *ut ante.* (E. 5.)

A replevin being granted, if the perſon who takes the diſtreſs "avows;" or if his bailiff make "conuſance," and prove the diſtreſs to be lawfully taken; or if upon removal of the plaint into the Courts above, the plaintiff whoſe cattle were replevied, make default or do not declare, or proſecute his action, and thereby becomes nonſuited; or if a verdict be given againſt him; in any of theſe caſes, the party diſtraining, that is, the defendant in replevin, ſhall have a writ *de retorno habendo*; which being a judicial writ, and not a returnable proceſs, if on the *pluries* the ſheriff return that the cattle, goods, or chattels are eloigned, he ſhall have a *ſcire facias* againſt the pledges according to the ſtat. of *Weſtm.* 2. and if they have nothing, then he ſhall have a *withernam* againſt the plaintiff's own cattle.

A bailiff who makes conuſance may have judgment of a return, and conſequently, a writ *de ret. hab.* grounded on ſuch judgment. *Ibid.*

Of Returns irrepleviſable. Bac. Abr. *ut ante.* (E. 6.)

Return irrepleviſable is a judical writ directed to the ſheriff for the final reſtitution of the cattle unjuſtly taken by another, and ſo found by verdict or after nonſuit in a ſecond deliverance.

If the plea be to the writ, or any other plea be tried by a verdict, or judged upon demurrer, return irrepleviſable ſhall be awarded, and no new replevin ſhall be granted, nor any ſecond deliverance by ſtat. *Weſtm.* 2. *c.* 2. but only upon a nonſuit.—But if upon iſſue joined the plaintiff does not appear on the trial, being called for that purpoſe, return irrepleviſable ſhall not be awarded, but the party may have a writ of ſecond deliverance.

If a man has return irrepleviſable, and a beaſt dies in the pound, *Ibid.*

pound, he may diſtrain anew: ſo, if the beaſt dies before judgment.

If a return irrepleviſable be awarded, the owner of the cattle may offer the arrearages; and if the defendant refuſe to deliver the diſtreſs, it being only in the nature of a pledge, the plaintiff may have detinue.

Such Proceſſes, how to be executed, Bac. Abr. *ut ante,* (E. 7.)

By the ſtat. *Weſtm.* 2. if the party who diſtrains, conveys the diſtreſs into any houſe, park, caſtle, or other place of ſtrength, and refuſes to ſuffer them to be replevied, the ſheriff may take the *poſſe comitatus*, and on requeſt, and refuſal, may break open ſuch houſe, caſtle, *&c.* and make deliverance. If the ſheriff return that the beaſts are incloſed in a park among ſavages, *&c.* or *quod mandavi ballivo libertatis, &c. qui nullum dedit mihi reſponſum*, or that the bailiff will not make deliverance of the cattle, theſe are not good returns; for he ought to enter the franchiſe and make deliverance.

Ibid. If a man ſue a replevin in the County Court without writ, and the bailiff return to the ſheriff, that he cannot have view of the cattle to deliver them, the ſheriff ought by inqueſt of office to enquire of the truth thereof, and if it be found by a jury that the cattle were eloigned, *&c.* the ſheriff may avoid a withernam to take the defendant's cattle: if he will not ſo do, the plaintiff ſhall have a writ out of Chancery directed to the ſheriff rehearſing the whole matter, commanding him to award a withernam, *&c.* and he may have an *alias*, and after a *pluries*, and an attachment againſt the ſheriff, if he will not execute the king's command.

Ibid. If the ſheriff return *quod averia elongata ſunt ad loca incognita*, it is a good return, and the party muſt purſue his writ of withernam; but if the ſheriff return *averia elongata ad loca incognita infra comitatum meum*, he ſhall be amerced, for the law intends that he may have notice in his county.

Ibid. *Quod averia mortua ſunt* is a good return: ſo, *quod nullus venit ex parte querentis ad demonſtranda averia*; but it ſeems the ſheriff is not obliged to require this.

Ibid. If the ſheriff come to take replevin of beaſts impounded in another man's ſoil; if the place be incloſed and have a gate

gate open to the incloſure. he cannot break the incloſure and enter thereby, where he may enter by the open gate: but if the owner hinder him, ſo that he cannot go by the open gate for fear of death, he may break the incloſure and enter there.

If the ſheriff be ſhewn a ſtranger's goods and he take them, treſpaſs lies againſt him, elſe the ſtranger could have no remedy. But it ſeems to have been held, that the action lies more properly againſt the perſon who ſhews the goods. *Ibid.*

The ſheriff is to return, that the cattle are eloigned, or that no perſon came to ſhew, *&c.* or a delivery: but he cannot return that the defendant *non cepit* the cattle, becauſe it is ſuppoſed in the writ, and is the ground of it, which the ſheriff cannot falſify. *Ibid.*

Of the Declaration.

Although it has been holden by ſome, that the count or declaration in replevin ſhould be certain and particular in ſetting forth the number, kinds, and qualities of the things diſtrained, for that otherwiſe the ſheriff cannot tell how to make deliverance of the ſame; yet Bac. Abr. tit. Replevin, &c. (H.)

It ſeems now to be ſettled, that a declaration in replevin being certain to a general intent is ſufficient; eſpecially if it be after verdict.

In his count the plaintiff muſt alledge the taking to be at a certain place, or (according to the precedents) *in quodam loco vocat'*, that the defendant may have notice as to what he is to anſwer, and make his title: therefore the alledging the taking *apud Dale*, or ſuch a vill, is too general and uncertain. *Ibid.*

In replevin both the vill and place are traverſable.

Where a defendant takes cattle wrongfully at firſt, the wrong is continued to any place where he had them in cuſtody, ſo that a place different from that where they were originally taken is well laid in the declaration, if defendant had them in cuſtody at ſuch other place. *Ibid.*

A man may count of ſeveral takings, part at one day and place, and part at another day and place; for he need not ſhew how many he took in one vill and how many in another. *Ibid.*

Ibid. Where the defendant counted of four oxen taken at divers times and places, and that delivery was made of two, but the other two were withheld to his damage 10*s.* this was held ſufficient without any ſeverance as to the damages.

Ibid. The count, as in other actions, muſt agree with the writ, ſo that if the writ be *de averiis*, and the count *de averiis & catallis*, this is ill.—In replevin the writ was in the *detinet*, and the count in the *detinuit*, and this was thought to be a material variance; but the parties agreed to amend.

Of the Pleas.

Bac. Abr. *ut ante.* (I.) Pleas in replevin are generally of four kinds, *viz.* either 1ſt. pleas in bar; 2dly. in juſtification; 3dly. by way of conuſance; 4thly. by way of avowry.—The defendant may either juſtify or avow at his election; but if he juſtifies, he cannot have a return.

Ibid. The general iſſue in replevin is *non cepit:* and one of ſeveral defendants may plead *non cepit*.

Ibid. If the defendant claim property in himſelf, or a ſtranger above, as he may do; though it ought to have been before the ſheriff, this does not amount to the general iſſue, but may be pleaded in bar or abatement, and if the plaintiff demur, the defendant ſhall have a return without avowing; for it appears that the beaſts are not the plaintiff's. But on the iſſue *non cepit*, property cannot be given in evidence, for that were contrary to it.

Ibid. If the defendant make conuſance as bailiff to *A.* the plaintiff cannot traverſe that he is his bailiff; for it is a matter of which by no intendment he can have knowledge.—But, if in bar of the avowry the plaintiff pleads that another had made conuſance as bailiff to *A.* for the ſame cauſe and was barred, he need not ſhew that it was with the privity of *A.* for it ſhall be intended; and if in truth it was without, the defendant may traverſe his being ever his bailiff.

Ibid. In a replevin againſt the maſter and bailiff or ſervant, if the bailiff makes conuſance as bailiff, and the maſter pleads that he did not take, the ſervant ſhall not have any return upon his conuſance, for by the maſter's plea his conuſance is changed into a juſtification.

Ibid. In replevin of beaſts taken at *D.* the defendant pleads in abatement

abatement that they were taken at another place, *absque hoc* that they were taken of *D.* and *pro returno habendo* avows for rent on a leaſe for years, *&c.* the plaintiff replies and traverſes the leaſe, *&c.* this is ill; for though the defendant, when he pleads in abatement, muſt alſo avow to have a return, yet the plaintiff cannot anſwer to it, but muſt take iſſue on the other matter.

Priſel in auter lieu, is only matter in abatement, and the plaintiff may have a new writ without being put to his ſecond deliverance. *Ibid.*

Of removing the Suit from the County Court, wherein of the Re. fa. lo. *Alſo of ſubſequent Proceedings, and compelling the Party to proceed.*

The ſuit remains before the ſheriff, *&c.* though the goods and chattels, *&c.* diſtrained are above the value of 40*s.* for the replevin, *alias*, and *pluries*, are all vicontiel writs, and the ſuit may be determined in ſuch inferior Court: but the ſuit may be removed by either of the parties into the Courts of K. B. or C. P. to be there determined, and that without any cauſe ſhewn. 2 Sell. Pract. 248.

The method of removing it depends on the manner in which the ſuit was commenced below.—If replevin be in the County Court by writ, it muſt be removed into K. B. or C. P. by *pone:* if by plaint, by writ of *recordari facias loquelam*, (called for brevity a *reſalo.*) If replevin is in a Court of Record, that may hold plea in replevin, it muſt be removed by *certiorari*, and not in any other manner; for a *reſalo* does not go to ſuch Court, becauſe there the ſuit is already recorded. If the plaint is in the Court of another lord, it may be removed into K. B. or C. P. by *recordari* to the Sheriff, commanding him *quod accedas ad curiam et in plena curia ill' recordari facias*, &c. but it is ſaid that a replevin ſhall not be removed out of any which is not the King's Court, without cauſe, either by the plaintiff or defendant; for the prejudice that may thereby come to the lord. *Ibid.*

All the above writs, to remove the ſuit from an inferior Court, are in their nature original writs and iſſue out of Chancery. The ſuit, however, is moſt commonly commenced *Ibid.* 249.

menced in the County Court by plaint; and very rarely at this day by writ.

In order to remove it, the party makes out a *præcipe* to the curſitor of the proper county; who then makes out the writ, which muſt be carried to the under-ſheriff of the county, who returns it of courſe.—If the ſheriff returns the *recordari, tardè*, the party ſhall have an *alias, &c.*

By the *recordari*, nothing is removed but the plaint, even though the iſſue ſhould be joined below; and the plaint may be removed, though the plaintiff has diſcontinued theſe.

The plaint, when removed into K. B. is filed with the filazer of the county: ſo, alſo when removed into C. P.

Of compelling Party to proceed.

2 Sell. Pract. 250.

If the plaintiff removes the plaint, he ſhould, upon the return of the *refalo*, file it with the plaint, *&c.* with the filazer of the county, and ſearch for the defendant's appearance: if the defendant has not appeared on or before the appearance-day of the return of the *refalo*, the plaintiff ſhould ſerve him with a rule to appear, which may be had at the filazer's, and upon his non-appearance thereto, ſue out a *pone*. The *pone* is alſo got at the filazer's; a ſummons is made out thereon at the ſheriff's-office, and ſerved upon the defendant by the officer. If no appearance is entered on or before the appearance-day of the return, get the ſheriff to return *nihil* on the *pone*, and ſue out a *diſtringas*, which may likewiſe be had at the filazer's, and proceed to levy thereon: the iſſues may be 4*l.* next 8*l.* and ſo on. If the defendant does not appear, proceed with *diſtringaſes ad infinitum*. If he does afterwards appear, he muſt pay the coſts of the *diſtringaſes*. Then declare *de novo*, noticing the proceedings in the Court below.—Rules may be afterwards given to compel the defendant to avow, and ſo on as in common actions.

Ibid.

But if the defendant removes it, he muſt file the *refala* and return thereto with the filazer; and having entered an appearance, he muſt give a rule for the plaintiff to declare; and for want of a declaration, when the rule is out, he may ſign a *non-pros.* for not declaring, and immediately ſue out a writ *de retorno habendo*.

Ibid.

If the *refalo* is not filed by the defendant, on or before the appearance-day of the return of it, notice muſt be given

given to the plaintiff of the filing thereof by a demand in writing being made of the declaration, before *non-pros.* can be ſigned; but if filed on the appearance-day of the return, ſuch demand is not neceſſary.

If the plaintiff has removed the cauſe, and does not proceed therein, or if the defendant has removed it, and after having ſerved the plaintiff with a rule to declare, and demanded a declaration, the plaintiff does not declare or proceed therein, the defendant may ſign a *non-pros.* and judgment *pro ret. hab.* and then ſue out a writ *pro ret. hab.* which he may obtain of the filazer. *Ibid.* 252.

If the defendant has taken out the *reſalo*, and does not get it returned and filed within two Terms, the plaintiff ſhould apply to the filazer for a certificate, that the ſame is not returned and filed: which certificate is a ſufficient warrant for the curſitor to make out a writ of *procedendo*, which remands the cauſe to the County Court to be there determined. *Ibid.*

If the *reſalo* is not returned, ſo as to enable the party to get it filed, the ſheriff muſt be ruled to return it. *Ibid.*

The Court will not ſtay proceedings in an action of replevin, unleſs upon payment of the rent in arrear, together with all coſts, though the arrears were tendered before with coſts up to that time. 1 Pull. & Buſ. 382.

Of Avowries.

An avowry, as has been before obſerved, is the ſetting forth, as in a declaration, the nature and merits of the defendant's caſe, and the ſhewing that the diſtreſs taken by him was lawful, which muſt be done with ſuch ſufficient authority as will entitle him to *retorno habendo.*

A diſtinction is to be obſerved between an avowry and a juſtification. An avowry always goes for a return, and therefore ſhews a right ſubſiſting at the time of the avowry, as made for rent, for example: but a plea of juſtification does not always go for a return; as where the original taking was lawful, but is not ſo at the time of the plea pleaded. 1 Eſp. N.P. 353.

In one reſpect, however, there is no difference between an

an avowry and a juſtification; for, generally ſpeaking, whatever is ſet forth in either, muſt be maintained.

Bac. Abr. tit. Replevin, &c. The defendant in replevin, to entitle himſelf to a return of the goods diſtrained, muſt make his avowry, unleſs it be in a caſe in which he claims property; ſo that though the plaintiff's writ abates, yet the defendant is not entitled to a *retorno habendo*, unleſs he had made his avowry.

Ibid. (A.) The avowant is in the nature of a plaintiff, as appears, 1ſt. from his being called an "actor," which is a term in the civil law, ſignifying plaintiff; 2dly. from his being entitled to have judgment *de retorno habendo*, and damages as plaintiff; and 3dly. from this, that the plaintiff may plead in abatement of the avowry, and conſequently, ſuch avowry muſt be in the nature of an action.

Ibid. An avowry therefore, is in the nature of a declaration, and it ſufficeth if it be good to a common intent. But it ſhould ſhew the certainty of the place, day, and cattle, to entitle the avowant to a writ of enquiry of damages.

Ibid. The plaintiff being however in the nature of a plaintiff, need not aver his avowry with a *hoc paratus eſt verificare*, more than any other plaintiff need aver his count, and being an actor, he ſhall not have a protection caſt for him more than any other plaintiff.

Ibid. The claim of right to diſtrain muſt be made out by the avowant againſt the plaintiff, who claims property in the diſtreſs; and the defendant in replevin cannot have a return of more cattle than he avows for.

Hob. 208. With reſpect to avowry for rent arrear, if the clauſe in the leaſe is "That if the rent be behind, being demanded "at another place beſide the land, or of the perſon of the "leſſee, that the leſſor may diſtrain;" there, if the leſſor diſtrain without any demand, it is unlawful; for the form of the demand is different from what the law requires, and 7 Co. 28, b. muſt be complied with.—But if the clauſe is "That if the "rent be behind, being lawfully demanded, that then he "may diſtrain;" it is no more than the law ſpeaks, and therefore the leſſor may diſtrain without a previous demand; for the diſtreſs is of itſelf a demand.

Hob. 133. But where a penalty is annexed to the non-payment of the

the rent and a diſtreſs is given for it, there a demand muſt be laid. As where the avowry was for rent and a *nomine poenæ*, and no demand alledged, the avowry was held to be clearly ill for the *nomine poenæ*, for want of a demand, but good for the rent; and the defendant had return for that.

However, where the iſſue was on a collateral matter, *viz. non conceſſit*, though no demand of the *nomine poenæ* was laid, it was held to be cured by a verdict. Hut. 42.

An avowry for part of a rent or penalty is bad, unleſs it ſhew how the remainder was diſcharged: for otherwiſe there may be another diſtreſs and avowry for the reſidue. Cro. Car. 104.

But an avowant may abate his own avowry for part of the rent diſtrained for; but not after judgment.

So, where an avowry is made for ſeveral rents, and it appears that part is not due, yet the whole avowry ſhall not abate. Bac. Abr. tit Replevin, &c. (C.)

In replevin *A.* avowed for a rent-charge, due *anno* 1660, and afterwards he diſtrained and avowed for another part of the ſame rent-charge, which became due before the ſaid year, and which was againſt a different tenant; in this caſe it was held by three Judges againſt a fourth, that the avowant was not eſtopped by his firſt avowry in ſuch manner as a leſſor is by giving an acquittance for the laſt gale of rent, but that he may at his pleaſure, avow for part of his rent at one time, and for part at another, in the ſame manner as the lord may command his bailiff to diſtrain for ſo much rent, and afterwards for the ſum due before. *Ibid.*

In avowry for rent, and ſo many hens for quit-rent, the avowant had a verdict for the whole; but it afterwards appearing upon the face of the avowry, that the hens were not due at the time of the diſtreſs, the avowant had leave to releaſe his damages as to them, and take judgment for the rent, with his coſts. *Ibid.*

Where a man is ſole ſeiſed or hath title to an entire rent, he ſhould diſtrain for it all at once.

But if the defendant avow for more than is due, though the avowry is for that reaſon bad, yet it may be cured. As where the defendant avowed for rent due at *Michaelmas*, and the diſtreſs appeared to have been made on the 26th of *September*, which was three days before *Michaelmas*, it was held, Salk. 580. 5 Mod. 364. *s.c.* Com. R. 42. *s.c.*

held, That though the avowry was bad (for the judgment is to have a return irrepleviſable till all the rent avowed for is paid, and ſo would be for more than was due,) yet that the defendant might before judgment abate his avowry for ſo much as was claimed to *Michaelmas* and take judgment for the reſt.

But where one is not ſole ſeiſed, or has not ſole title to the entire rent, he cannot avow alone, for ſuch avowry would be bad.

Salk. 390. Therefore parceners muſt join in an avowry for rent or making conuſance, for they make but one heir, and the rent is an entire inheritance.

Bac. Abr. tit. Replevin, &c. (K.) Joint-tenants alſo ſhould join.

Ibid. But tenants in common are to ſever in their avowries.—It is ſaid however that one tenant in common cannot avow the taking of the cattle of a ſtranger upon the land damage feaſant, without making himſelf bailiff or ſervant to his companion:—but in one caſe the contrary is held.

Cro. Eliz. 530.

Bac. Abr. *ut ante.* In replevin againſt two, they made ſeveral avowries, each in his own right, and both avowries were abated; for if both the iſſues ſhould be found for the avowants, the Court could not give judgment ſeverally for the ſame thing.

2 Bl. R. 1326. An annuitant may diſtrain for a rent though the term be veſted in himſelf to ſecure the payment, for the grantor will be deemed *quaſi* tenant to the party at a rent to the amount of the annuity.

2 Str. 550. Where the leſſee has entered under a leaſe, though ſuch entry be tortious, it does not diſcharge the contract for the payment of rent; for there is a great difference between replevin and ejectment.

Bac Abr. *ut ante.* If one diſtrain for rent, and before the avowry the eſtate on which it was reſerved determine, the avowry ſhall be as if the eſtate on which it was reſerved had continued, for the avowant is to have the rent notwithſtanding: but if the diſtreſs were for a perſonal ſervice, the defendant muſt have a ſpecial juſtification, for he cannot have the ſervice *in ſpecie*, when the eſtate is determined.

The defendant in replevin need not ſet out his title: for the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 22. enacts "That it ſhall and "may be lawful for all defendants in replevin to avow or "make

" make conuſance generally, that the plaintiff in replevin " or other tenant of the lands and tenements whereon ſuch " diſtreſs was made, enjoyed the ſame under a grant or " demiſe at ſuch a certain rent, during the time wherein " the rent diſtrained for incurred, which rent was then and " ſtill remains due;" "without further ſetting forth the " grant, tenure, demiſe, or title of ſuch landlord or land- " lords, leſſor or leſſors;" " and if the plaintiff or plaintiffs " in ſuch action ſhall become nonſuit, diſcontinue his, her, " or their action, or have judgment given againſt him, her, " or them, the defendant or defendants in ſuch replevin " ſhall recover double coſts of ſuit."

The defendant may avow in this general manner whether the plaintiff be tenant or not, for the words of the ſtatute are in the diſjunctive " plaintiff in replevin or other te- " nant."

Where the rent reſerved at the time of entering upon the premiſſes, was afterwards varied by agreement between the parties, yet it was holden that the landlord might avow as on a demiſe at a rent certain, for that ſuch ſubſequent agreement operated by relation, to make it a reſervation of the rent from the beginning. Bac. Abr. *ut ante.*

The ſtatute was made for the benefit of landlords, that after the tenant had enjoyed the land he ſhould not be allowed to pry into the leſſor's title: therefore, if the defendant avow under the ſtatute *nil habuit in tenementis*, it is a bad and inadmiſſible plea, for it attempts to bring the leſſor's title in queſtion: were the premiſſes in mortgage, for example, if this plea were allowed, the defendant could not recover his rent, which the ſtatute never had it in contemplation to prevent, but rather to aſſiſt. 2 Wilſ. 208.

So, there may be judgment in replevin though the party miſrecites his title, provided he ſhews a good and ſubſiſting one. As where the plaintiff entitled himſelf by a leaſe of the 3d of *March*, the defendant traverſed the leaſe *modo et forma*; the jury found a leaſe of another date; yet judgment was given for the plaintiff; for the ſubſtance of the iſſue is, whether he has a leaſe or not: yet if they had found a leaſe from another, it would not have done. But if he had declared thus in ejectment, it had been againſt him, Hob. 72.

him, for there he is to recover the term, and is to make his title truly.

Cro. Eliz. 547. If executors avow under ſtat. 32 *H.* 8. *c.* 37. for rent in fee, *&c.* due to their teſtator, they muſt ſhew the land in the ſeiſin of the tenant, or in thoſe who claim under him.

Co. Lit. 162. *b.* If a perſon diſtrains as executor or adminiſtrator, he muſt bring himſelf within the ſtatute; under the words of which, the diſtreſs can be made only on the tenant in whoſe hands the lands were chargeable, or ſome perſon claiming under him; and therefore not in the hands of one claiming by title paramount, as the lord by eſcheat.

Hob. 208. Bac. Abr. tit. Replevin, &c. (K.) But where the avowry was as adminiſtratrix of rent to which the defendant was entitled in her own right, ſhe nevertheleſs had judgment, that part reſpecting the claim as adminiſtratrix being rejected as ſurpluſage.

Co. Lit. 162. *b.* Vaugh. 40. The Act in queſtion gives no remedy where the teſtator himſelf has diſpenſed with the arrearages, or had no remedy when he died.

Cro. Jac. 283. An avowry by huſband and wife for rent due to the wife alone before the coverture, was held to be good, the ſuppoſed inconſiſtency being mere matter of form; for the avowry being for rent arrear, to ſay that it was arrear to him and his wife, is but ſurpluſage; and although he doth not ſay *adhuc à retro exiſtit*, it was held well enough in ſubſtance.

Bro. Abr. *tit. ante.* Alſo, if there be leſſee for years, and the reverſion deſcend on a feme covert, and afterwards the rent be in arrear, and the baron diſtrain, and the leſſee bring a replevin, the baron ought to avow in the name of himſelf and his wife, and not in the name of himſelf only, for the avowry is to be made according to the reverſion, which is in the feme.

Cro. Jac. 442. But an avowry by a huſband alone for rent due to him and his wife is good, if it appear upon the record that *he* was entitled to make the diſtreſs.

Eſp. N. P. 357. 8 Co. 147. *a.* Though the defendant may be entitled to the rent, yet may the diſtreſs be tortious. As if he come on the land to diſtrain, and the tenant then tenders the arrears due; in ſuch caſe, if he diſtrain the cattle, it is tortious, and the defendant may replevy.—But it is not ſufficient for the

Hut. 13. tenant to ſay that he was on the land on the day and ready

to pay the rent; for if he did not make a tender *at the time of the diſtreſs made*, the taking was not tortious. The tender muſt be before the impounding, for when impounded they are *in cuſtodiâ legis*. Cro. Eliz. 813.

Non demiſit; nothing in arrear; nothing in arrear for part of the rent and tender of the reſidue; are good pleas to an avowry for rent. Bac. Abr. *ut ante.*

So, a tender and refuſal may be pleaded to ſuch avowry, without bringing the money into Court; becauſe if the diſtreſs were not originally taken, the defendant muſt anſwer the plaintiff his damages. Bull. N.P. 62.

After an avowry for rent arrear the plaintiff may pay into Court the rent for which the defendant avows, becauſe the demand is certain: but not where the damages are unliquidated. 1 H. Bl. R. 24.

That the avowant afterwards uſed or ſold the cattle or goods diſtrained, may alſo be pleaded. Com. Dig. *ut ante.* (K. 19.)

So, to an avowry for rent, the tenant may plead payment of a ground-rent to the original landlord, which he paid to protect himſelf from a diſtreſs; for it is a payment of ſo much to the immediate landlord. 4 T. R. 512, 14.

But the plaintiff cannot plead a ſet-off; becauſe this action is founded in a tort, and the ſtat. 2 *G.* 2. does not extend to ſuch actions; beſides a ſet-off ſuppoſes a different demand ariſing in a different right. Neither can a mutual demand be given in evidence, where the defendant juſtifies under a diſtreſs.—Yet it is ſaid, that he may plead a mutual debt of more than the rent by way of ſpecial plea to the avowry. Bac. Abr. *ut ante.* Bull. N.P. 181. Bar. 450.

If on avowry for non-payment of rent, a plea in bar is *de injur. ſua propria abſq. hoc, quod præd. R. cepit, &c.* *Non cepit* is no good traverſe, but he ſhould purſue his title, and *de injur. ſua propria* is enough. Com. Dig. *ut ante.* (3 K. 16.)

After iſſue joined upon a plea in bar to an avowry, the Court will not ſuffer the plea to be withdrawn and the avowry confeſſed, without conſent, for the avowant will loſe his coſts. *Ibid.* (3 K. 20.)

As to what ſhall be a departure, replevin was for taking the plaintiff's goods and chattels, to wit, a lime-kiln, avowry 4 T.R. 505.

for rent; plea in bar, that the lime-kiln was affixed to the freehold: the Court held the plea in bar bad, becauſe it was a departure from the declaration, which had treated the lime-kiln as a chattel.

In an avowry for a diſtreſs for rent, the avowant was to ſhew a ſeiſin, and ſuch ſeiſin by the ſtat. 32 *H.* 8. *c.* 2. muſt be alledged within fifty years before the making of the avowry or conuſance: and though by ſtat. 21 *H.*8. *c.* 19: the lord need not avow upon any perſon in certain, yet he muſt alledge ſeiſin by the hands of ſome tenant in certain, within fifty years.—Where the commencement of the rent appears, ſeiſin is not material.

The ſtat. 32 *H.* 8. *c.* 2. which limits an avowry or conuſance for rent, ſuit, or ſervice, to a poſſeſſion of fifty years next before making the avowry, *&c.* does not extend to a new rent created by Act of Parliament.

Of Avowry, &c. for Cattle damage feaſant.

Reſpecting avowry or conuſance for damage-feaſant, if the defendant avows, or makes conuſance for damage-feaſant, he muſt ſhew that the place where, *&c.* is his freehold, or the freehold of *B.* under whom he makes conuſance: and if he ſays that he himſelf or *B.* was ſeiſed, he muſt ſay of what eſtate in fee, tail, or for life.

Bac. Abr. tit. Replevin, &c. (F.)

So, the bailiff who diſtrains for damage-feaſant in right of a deviſee, muſt ſet forth what eſtate the deviſor had; it is not ſufficient to ſay in general; that he was ſeiſed.—The ſtat. 11 *G.* 2. applies only to avowries for rent arrear.

Ibid.

In replevin the title was by a leaſe made by a parſon, and the avowry was that *A.* was ſeiſed of the rectory of *H.* and made the leaſe without ſhewing that he was parſon: and by the Court, that would have been a good exception, had it not been ſaid in the avowry, that he was ſeiſed *in jure eccleſiæ*, which ſupplies all.

Ibid.

The general rule indeed in pleading is, that where a title is made under a particular eſtate, the commencement of that eſtate muſt be ſhewn, but that an eſtate in fee may be alledged generally.

Ibid.

In an avowry the iſſue was, whether the place where, *&c.* was the freehold of the avowant or not, and it was found by the verdict, that it was the freehold of the avowant's

ant's wife. *Et per Cur.*—It is found againſt the avowant, for when he ſaith *his* freehold, it is to be intended his ſole freehold, and in his own right.

Though the cattle of a ſtranger cannot be diſtrained unleſs they were levant and couchant, yet it muſt come on the other ſide to ſhew that they were not ſo. *Ibid.*

In replevin for *bona, cattala, et averia*, a conuſance of the whole and a juſtification for part is bad; for if a diſtreſs be entire, and it is wrong in part, it is bad for the whole. *Ibid.*

If a man take a diſtreſs for a thing for which he had good cauſe of diſtreſs, but had good cauſe of diſtreſs for another thing, if a replevin is brought and he comes into Court, he may avow for which he pleaſes. *Ibid.*

To an avowry that the freehold was in the defendant or the party under whom he makes conuſance, the plaintiff may ſay in bar, that it is his freehold; or, the freehold of *A.* and by licence he put his cattle there; or, a ſpecial title by deviſe, fine, demiſe, *&c.* Com. Dig. tit. Pleader. (3 K. 22.)

So, the plaintiff may plead in bar to an avowry, *de ſon tort*, with a traverſe that *locus in quo, &c.* is parcel of the tenements alledged to be held. *Ibid.* (3 K. 16)

Replevin for taking his cattle in the road, avowry for damage-feaſant in the four acres, ſo took them there and drove them along the road to impound them; plea in bar, that the road is not parcel of the four acres: upon demurrer, the avowry was held well enough and the plea ill; for by connecting the beginning of the avowry and conuſance with the latter end thereof, it appeared to be one entire tranſaction. 3 Wilſ. 295.

So, the plaintiff may plead in bar "tender of amends." Com. Dig. *ut ante.* (3 K. 23.)

If the defendant pleads that he was ſeiſed of three acres *in loco in quo, &c.* it is ſufficient, without ſaying how many acres the *locus in quo, &c.* had. *Ibid.*

Where there were two iſſues, and one only found for the avowant, he had judgment.—Where the parties agree in the facts, the circumſtance of the jury finding otherwiſe is not material. Bac. Abr. *ut ante.* *Ibid.*

By ſtat. 21 *H.* 8. *c.* 19. all plaintiffs and defendants ſhall have like pleas and like *aid priers* in all ſuch avowries, co-

nuſances, and juſtifications (pleas of diſclaimer only excepted,) as they might have had before the Act.

2 Sell. Pract. 253. Where proceedings are removed from the County Court, the *recordari facias loquelem* (called for brevity ſake the *refalo*) being returned and appearance of defendant entered, the plaintiff muſt declare *de novo*, nor need any notice be taken of the proceedings below. To the declaration, the defendant may plead in abatement or bar; or he may avow in his own right, or make conuſance in right of another as his bailiff, or may juſtify; and the parties go on to iſſue or demurrer to be tried or argued in the uſual way.

Ibid. But as both parties are actors in replevin, either of them may take down the record to trial; for which reaſon there can be no judgment as in caſe of a nonſuit in replevin; and if the defendant gives notice of trial and does not proceed, the Court will give coſts againſt him.

Section III. *Of the verdict and judgment in Replevin.*

On the execution of the writ of replevin by the ſheriff, the beaſts diſtrained are actually returned to the plaintiff, ſo that he hath the poſſeſſion and uſe of the cattle pending the ſuit; conſequently if the plaintiff in replevin hath judgment, it can only be for damages.

2 Sell. Pract. 271. At common law (even before the ſtatute of *Glouceſter*) the plaintiff in replevin could recover damages, and by that ſtatute his coſts. But the avowant or defendant was not entitled to either, till the 7th *H.* 8. *c.* 4. which gives damages and coſts to every avowant, and to every perſon making conuſance, or juſtifying as bailiff in replevin, for any rent, cuſtom, or ſervice, if his avowry, conuſance, or juſtification be found for him, or the plaintiff be otherwiſe barred. Alſo, by ſtat. 21 *H.* 8. *c.* 19. it is enacted, "That every avowant, and every other perſon or perſons that make any avowry, juſtification, or conuſance, as bailiff or ſervant to any perſon or perſons in any *replegiare* or ſecond deliverance, for rents, cuſtoms, ſervices, or for damages feaſant, or for rent or rents, upon any diſtreſs taken in any lands or tenements, if the ſame avowry, or conuſance, or juſtification, be found for them or the plaintiffs in the ſame non-

ſuit,

ſuit, or otherwiſe barred, that then they ſhall recover their damages and coſts againſt the ſaid plaintiffs, as the ſame plaintiffs ſhould have done, or had if they had recovered in the *replegiare* or ſecond deliverance found againſt the defendants."

Neither this ſtatute, nor that of 43 *Eliz.* [if the defendant avow as overſeer for a diſtreſs for a poor's rate,] tie the inquiſition up to the ſame jury as are returned or impannelled, as the ſtat. 17. *C.* 2. *c.* 7. (of which hereafter) does. If therefore, there is a verdict for the plaintiff, the jury uſually aſſeſs the damages: or the jury after verdict may be diſmiſſed, and damages be aſſeſſed by the Juſtices, with the defendant's conſent. Or if the jury do not aſſeſs the damages, and the goods, *&c.* ſhould be detained, the plaintiff may make a ſuggeſtion thereof upon the roll, whereupon a writ ſhall go to enquire of the value of the cattle, *&c.* and damages; upon which the plaintiff ſhall have judgment for both. *Ibid.*

If there be judgment for the plaintiff upon a *relicta veri-* *Ibid.* 272.
ficatione, cognovit actionem, nil dicit, &c. or for want of a replication to his plea in bar to the avowry, or upon a demurrer, a writ of enquiry of damages ſhall be awarded: or at the requeſt of the plaintiff, by the aſſent of the defendant, the Juſtices may aſſeſs the damages without ſuch writ.

But if there be judgment for the plaintiff, *quod adhuc detinet* by default after appearance, there ſhall be a ſpecial writ of enquiry for the value of the goods or cattle and damages.—But where the taking was lawful, the damage ſhall be only for the detainer; as where goods are taken damage feaſant, and detained after amends tendered.

If the plaintiff lets judgment go by default, or becomes *Ibid.*
nonſuit, the defendant is entitled to his judgment *pro retorno*, and to a writ of enquiry, to aſſeſs his damages and coſts; or if the defendant get a verdict, the jury may aſſeſs the damages, or if he omit ſo to do a writ of enquiry may go.

The judgment after verdict for the defendant need not *Ibid.*
expreſs the return to be irrepleviſable, becauſe now it neceſſarily muſt be ſo, ſince the ſtatute of *Weſtm.* 2. Therefore a judgment in replevin "that the defendants have a

" return of the cattle, and recover their damages and coſts " aſſeſſed by the jury," *&c.* is good, either as a judgment at common law, though the return be not adjudged irrepleviſable, or as a judgment under ſtat. 21 *H.* 8. *c.* 19. which entitles the defendants to damages and coſts; but not under ſtat. 17 *C.* 2.

Ibid. 273. If the defendant upon the judgment *de ret. hab.* ſue out a writ *pro ret. hab.* and the ſheriff cannot find the cattle, he may have a *capias* in withernam upon the return of the *elongata*. But if the defendant has judgment for a return irrepleviſable, if the owner of the cattle or goods tenders all that is due on the judgment and it is accepted, he ſhall have a writ of delivery for the goods: ſo if he tenders the whole upon the judgment which is aſcertained upon the avowry, and is refuſed, he ſhall have detinue.

Ibid. In avowry for damage feaſant, defendant had a verdict, and adjudged that he ſhall have a *ret. hab.* for the cattle, and a *ca. ſa.* for the damages; but if the party tender the coſts and damages, the ſheriff, after ſuch tender, ought not to execute the *ret. hab.* But if, for want of ſuch tender, he do execute the *ret. hab.* and afterwards the coſts and damages are paid, a writ *ſi conſtare poterit* lies upon ſuggeſting that the coſts, *&c.* are paid, and this is to re-deliver the diſtreſs, and is called " a writ of reſtitution."

Ibid. It is now ſettled, that pleadings in replevin are within the ſtat. 4 *Ann. c.* 16. therefore, where ſome iſſues in the replevin are found for the plaintiff which entitle him to judgment, and ſome for the defendant, the latter muſt be allowed the coſts of the iſſues found for him out of the general coſts of the verdict; unleſs the Judge ſhall certify that the plaintiff had probable cauſe for pleading the matters on which thoſe iſſues are joined.

Ibid. An avowant ſhall pay coſts on the ſpecial avowries found againſt him: and ſhall not have coſts on the affirmance of a judgment in his favour on a writ of error.

Ibid. 274. The ſtat. 11 *G.* 2. *c.* 19. *s.* 22. gives the defendant or defendants in replevin making avowry or conuſance upon diſtreſſes for rent, relief, heriot, or other ſervice, in caſe the plaintiff in the action ſhall become nonſuit, diſcontinue, or

have

have judgment againſt him, double coſts.—The avowry muſt be for taking the goods, &c. as a diſtreſs; elſe it will be out of the ſtatute.

Of the Non Pros., Nonſuit, Verdict, and Judgment, under Stat. 17 Car. 2. c. 7. *where the Diſtreſs was for Rent.*

If the cauſe has been removed into the ſuperior Court by the plaintiff, and after the defendant has appeared he does not declare or proceed therein; or if the cauſe has been removed by the defendant, and a rule having been ſerved on the plaintiff, he does not declare or proceed therein; the defendant may in theſe caſes ſign a *non pros.* enter up judgment *pro retorno habendo*, and, if the original diſtreſs were made for rent, he may proceed to execute a writ of enquiry of damages, which is the better way than taking out a writ *pro retorno habendo*, becauſe that writ may be ſuperſeded by the plaintiff ſuing out a writ of ſecond deliverance, as has been ſeen before. 2 Sell. Pra. 267.

For the ſtat. 17 *C.* 2. *c.* 7. which is an Act for the more ſpeedy and effectual proceeding upon diſtreſſes and avowries for rent, after reciting that "Foraſmuch as the ordinary "remedy for arrearages of rents is by diſtreſſes upon the "lands chargeable therewith; and yet nevertheleſs, by "reaſon of the intricate and dilatory proceedings upon re-"plevins, that remedy is become ineffectual:" by Sect. 2. enacts, "That whenſoever any plaintiff in replevin ſhall "be nonſuit before iſſue joined in any ſuit of replevin by "plaint or writ lawfully returned, removed, or depending "in any of the King's Courts at *Weſtminſter*, that the de-"fendant making a ſuggeſtion in nature of an avowry or "cognizance for ſuch rent, to aſcertain the Court of the "cauſe of diſtreſs, the Court upon his prayer ſhall award "a writ to the ſheriff of the county where the diſtreſs was "taken, to enquire, by the oaths of twelve good and law-"ful men of his bailiwick, touching the ſum in arrear at "the time of ſuch diſtreſs taken, and the value of the "goods or cattle diſtrained: and thereupon notice of fifteen "days ſhall be given to the plaintiff or his attorney in "Court, of the ſitting of ſuch enquiry; and thereupon "the ſheriff ſhall enquire of the truth of the matters con-

" tained in ſuch writ by the oaths of twelve good and law-
" ful men of his county; and upon the return of ſuch in-
" quiſition, the defendant ſhall have judgment to recover
" againſt the plaintiff the arrearages of ſuch rent, in caſe
" the goods or cattle diſtrained ſhall amount unto that
" value; and in caſe they ſhall not amount to that value,
" then ſo much as the value of the ſaid goods and cattle ſo
" diſtrained ſhall amount unto, together with his full coſts
" of ſuit, and ſhall have execution thereupon by *fieri facias*,
" or *elegit*, or otherwiſe, as the law ſhall require: and in
" caſe ſuch plaintiff ſhall be nonſuit after cognizance or
" avowry made, and iſſue joined, or if the verdict ſhall
" be given againſt ſuch plaintiff, then the jurors that are
" impanelled or returned to enquire of ſuch iſſue, ſhall, at
" the prayer of the defendant, enquire concerning the ſum
" of the arrears, and the value of the goods and cattle
" diſtrained; and thereupon the avowant, or he that makes
" cognizance, ſhall have judgment for ſuch arrearages, or
" ſo much thereof as the goods or cattle diſtrained amount
" unto, together with his full coſts, and ſhall have execu-
" tion of the ſame by *fieri facias* or *elegit*, or otherwiſe, as
" the law ſhall require."

Sect. 3. gives the like remedy to the avowant or party making cognizance for any rent, upon a judgment given for him upon demurrer.

Sect. 4. enables the party or his repreſentatives to diſtrain again for the reſidue of the arrears, in caſe the value of the cattle, *&c.* taken by the firſt diſtreſs ſhall not be the full value of the arrears diſtrained for.

8 Bell, Pract. 289. By the above ſtatute, in caſe of a nonſuit or *non prof.* before iſſue joined, defendant may enter a ſuggeſtion upon the record, in the nature of an avowry or conuſance, and thereupon ſue out a writ of enquiry; but in caſe of a nonſuit at the trial, or of a verdict for defendant, the jury at the trial muſt enquire of the rent in arrear, and the value of the goods diſtrained.

Ibid. If they omit to make ſuch enquiry, no other jury can afterwards make it; no writ of enquiry therefore can go, the defendant cannot enter his judgment according to the ſtatute and proceed to execution by *fi. fa.* or *ca. ſa.* but muſt

muſt reſort to his common law judgment, and ſue out his writ *de retorno habendo:* and this if the jury omit to enquire either of the rent or the value of the goods, for they muſt aſſeſs both; as the ſtatute muſt be ſtrictly complied with.— But this is only in caſes of rent within the ſtatute; and not in thoſe of nonſuit in other caſes: indeed Lord *Hardwicke* has laid it down, that in every caſe, unleſs where the Court is tied up by this ſtatute, a writ of enquiry may be granted in order to do complete juſtice. Ca. temp. Hardw. 138.

If the plaintiff become nonſuit, the defendant is not bound to take his remedy under the ſtatute, but has his option either to proceed by writ of enquiry under it, or to bring his action againſt the plaintiff and his ſureties on the replevin bond. 2 Sell. Pract. 269.

Nor does the ſtatute take away or alter the judgment at common law; it only gives a further remedy to the avowant. So that after a *non pros.* plaintiff may ſtill enter his judgment *pro retorno:* but it is better to make a ſuggeſtion, and proceed by writ of enquiry; becauſe if the plaintiff ſue out a writ of ſecond deliverance, it will operate, as has been obſerved, as a *ſuperſedeas* of the *ret. hab.* but not ſo to the writ of enquiry: for by this ſtatute, the legiſlature intended that the proceeding by writ of enquiry, *fi. fa.* and *elegit*, ſhould be final for the avowant to recover his damages, and that the plaintiff ſhould keep his cattle notwithſtanding the courſe of awarding a *ret. hab.* which is the right judgment, and is ſtill entered up as before the ſtatute. *Ibid.*

Where the judgment is for the defendant after verdict, if the jury have not enquired at the trial as the ſtatute directs, it muſt be entered up as a common law judgment *pro ret. hab.* But if the jury have aſſeſſed damages, but not the amount of the rent, *&c.* it may be entered as a judgment under ſtat. 21 *H.* 8. *c.* 19: and the Court will permit the defendant to amend his judgment if entered as under the ſtatute, and not warranted thereby, to make it a common law judgment. *Ibid.* 271. 4 T. R. 509.

Where the defendant made conuſance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his conuſance, without finding either the amount of the rent in arrear or the value of 3 T. R. 349.

the cattle diſtrained, and judgment was entered for the damages aſſeſſed, the Court permitted the defendant to amend his judgment, and to enter a judgment *pro ret. hab.* after a writ of error brought.

2 Bl. R. 763. In replevin the plaintiff avowed for a year's rent; verdict for the defendant; but no value found for the jury. It was moved for a writ of enquiry under the ſtat. 17 *C.* 2. *c.* 7. to aſcertain the rent in arrear, and the value of the cattle. *Gould* J. doubted whether it could be granted to ſupply a defective verdict in caſe of rent; though after a judgment by default it would certainly lie; and added, that *Burrow's* note of *Andrews* and *James*, *M.* 24 *G.* 2. *B. R.* appeared to be a judgment by default. However, no cauſe being ſhewn, the rule was made abſolute.

Bac. Abr. tit. Replevin, &c. (D.) If there has been no avowry, the Court will ſet aſide a writ of enquiry obtained and the inquiſition thereon; for the avowry is in the nature of a declaration, and is the only ground of an enquiry, for the defendant in replevin.

Section IV. *Of the Remedies where the Pledges prove inſufficient.*

1. *By Action againſt the Sheriff.*
2. *By* Scire Facias *againſt the Pledges.*
3. *By Proceeding on the Replevin Bond.*

1. *Of the Action againſt the Sheriff.*

2 T. R. 617. 2 Sell Pract. 262. The ſheriff, upon making replevin, is bound, as has been before ſtated, to take pledges, and they muſt be ſufficient pledges; for if they are not, an action on the caſe will lie againſt him: the Court, however, will not proceed in a ſummary way, by granting an attachment againſt the ſheriff for neglecting to take a replevin bond.

Ibid. Gilb. L. of Rep. 220. In caſe pledges are taken and they prove to be inſufficient, the party has a double remedy, viz. againſt the ſheriff and againſt the bail: againſt the ſheriff by action, and againſt the bail, if the diſtreſs was not for rent, by *ſcire facias*; if for rent, either by *ſcire facias*, or upon the replevin bond, aſſigned according to the ſtatute.

Ibid 97. The pledges taken by the ſheriff when the diſtreſs is not for rent are according to the ſtatute of *Weſtm.* 2. and may be

be by bond, and that too of the plaintiff himself only, for the sheriff being answerable for the sufficiency of the pledges, may take the security as he pleases, since it is at his own peril.—But he cannot take money or cattle as a pawn or pledge. Cro. Car. 446.

The pledges taken when the distress is for rent are governed by stat. 11 *G.* 2. *c.* 19. and must be by bond with two sureties, and ought to be at least in double the value of the goods distrained. The sheriff, the under-sheriff, and the replevin-clerk, are, as has been before observed, all liable to the defendant in replevin for the sufficiency of the pledges *de retorno habendo.* 2 Bl. R. 1220.

The mode of proceeding on the stat. 11 *G.* 2. *c.* 19. is now generally preferred to the old remedy by *sci. fa.* where the distress was for rent: and it is not affected by the 17 *C.* 2. *c.* 7. for where, in pursuance of that statute, the avowant had judgment for want of a plea in bar, it was held that he had two methods of proceeding in his election; namely, either to execute a writ of enquiry or to sue upon the replevin bond; the plaintiff not having prosecuted his suit with effect. Gilb. L. of Rep. 225. 2 Wilf. 42.

The action ought to be brought in the name of the person making conusance, where there is no avowant on the record. 1 Pull. & Buf. 378.

In the action against the sheriff some evidence must be given by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the proof on the sheriff; for the sureties are known to him, and he is to take care that they are sufficient. Bull. N. P. 60.

This action against the sheriff will lie without any *scire facias* previously sued out against the bail. But in a case before mentioned, after judgment *pro ret.* and an *eloignment* returned, the Court on motion granted a rule against the sheriff, under-sheriff, and replevin-clerk, to pay the defendant 57 *l.* 15 *s.* the amount of the verdict in replevin (damages and costs) together with the costs of the application. 2 Sell. Pract. 263. 2 Bl. R. 1220.

Much doubt has been entertained, and the Courts still differ as to the *quantum* of damages which the plaintiff ought to recover in this action against the sheriff for taking insufficient pledges.

In

2 Sell. Prac. 263. In the King's Bench it is held, that the plaintiff cannot recover beyond the value of the diſtreſs. The argument is, that the duty of the ſheriff as preſcribed by the Act, is to take the bond for proſecuting the ſuit and for a return of the goods, if a return ſhall be awarded: the bond therefore would be ſatisfied by returning the goods taken. If ſo, the value of thoſe goods ſeems to be the true meaſure of damages to be given by this action. That by the ſtat. *Weſtm.* 2. it is ſpecifically mentioned, that if any take pledges otherwiſe, he ſhall anſwer for the price of the beaſts: and that the 11 *G.* 2. does not enlarge the ſheriff's reſponſibility in this reſpect.

Ibid. 264. But in the Common Pleas the direct contrary is holden, and there the plaintiff may recover the amount of his rent, his coſts in the replevin ſuit, the value of the goods, and whatever other damages the jury may give him, even beyond the penalty of the replevin-bond, *i. e.* more than double the value of the goods diſtrained.—As the Court in giving judgment in this caſe were aware of the contrary determination in the King's Bench, they thought proper to give their reaſons for differing in opinion, and to enter fully into the law upon the ſubject: which, as it may be explanatory of the doctrine of pledges in replevin, and of the alteration made in the common law by ſtat. *Weſtm.* 2. and *G.* 2. it may not be unimportant here to detail.

2 H. Bl. R. 40.

Ibid. At common law, the ſheriff, on delivering the goods, took pledges to proſecute, who were to anſwer the amerciament. By the ſtat. *Weſtm.* 2. "He who delivered the goods was alſo to take pledges for the return of "the beaſts or the price of them;" and it appears from 2 *Inſt.* 340. "That if he took inſufficient pledges, they "were no pledges within that ſtatute, and the ſheriff was "charged by it as if he had taken no pledges at all." At that time, then, the ſheriff was liable to anſwer the value of the goods. From thence down to 21 *H.* 8. there could be no queſtion as to coſts, as there were no coſts given to the avowant before the paſſing of the ſtat. 21 *H.* 8. *c.* 19. But it appears from 2 *Inſt.* 107. and 341. that after judgment of return irrepleviſable, the lord or avowant was not bound to return the cattle, unleſs not only the arrear-

ages

ages of rent were tendered, but also "all that was done "upon the judgment to avowry."

Thus the law stood, till the Act of 11 *G.* 2. *c.* 19. was made; the last section of which was to remedy the mischiefs of vexatious proceedings in replevin. In this action also the case is supposed that the bond, which is the additional security, might be forfeited: if so, the penalty is a debt, and judgment must be entered up to the extent of it. But in the same section there is an equitable jurisdiction given to the Court to qualify the penalty, by giving such relief to the parties upon the bond as may be agreeable to justice and reason, by rule of Court, which shall have the nature and effect of a defeasance of the bond. This made a material alteration in the law with respect to the relief which the landlord has where the replevin is vexatious: as the judgment is for the whole penalty, it must cover, according to the equitable jurisdiction of the Court, all that has been lost by the proceeding; there would be no equity, it would not be "agreeable to justice and reason," unless the whole were covered. If, therefore, an action were brought on the security given by the statute, the party would be entitled to the whole.—The only question then is, how far he shall be entitled where he does not proceed upon the statute. In *Prowse* and *Pattison* (*Bull. N. P.* 60.) it was decided, after great doubt, that an action on the case would lie. What then is the measure of damages in an action on the case against an officer for neglecting the duties of his office? What has the plaintiff lost by the neglect? This is a culpable neglect, not merely a simple non-feasance, and must have been accompanied with a bad intention. The rule, then, must depend upon what damages the party has sustained. The great doubt we have had has been, whether we could go beyond the penalty of the bond. But this is the same sort of question as whether an action on the case would lie; and there is no rule which says that in an action on the case for an injury accompanied with a bad intent, less shall be recovered than the whole damages sustained.—The verdict, therefore, must be entered for the whole sum found by the jury. *Ibid.*

2. *Of*

2. *Of the Remedy by* Scire Facias *againſt the Pledges.*

2 Sell. Pract. 166. Another remedy which the defendant in replevin has, if the plaintiff does not make a return of the goods when a return has been awarded, is, by *ſcire facias* againſt the pledges. Before a *ſcire facias* iſſues, a writ *pro ret. hab.* muſt have been ſued out, and an *elongata* or eloignment be returned by the ſheriff. After which, if the names of the pledges be not known, an application may be made to the replevin-clerk, and if he refuſes or delays to tell them, the Court on motion will make a rule upon him for that purpoſe.

4 Will. 41. If the plaint has never been removed, the defendant may ſign a *non pros.* in the Court below, and have a precept in the nature of a *ſcire facias.*

Note. The two preceding remedies are uſed where the diſtreſs is not for rent, as well as where it is.

3. *Of the Remedy on the Replevin Bond.*

2 Sell. Pract 266. The uſual remedy where the diſtreſs is for rent and a replevin bond is entered into, according to ſtat. 11 *G.* 2. *c.* 19. is by taking an aſſignment of the replevin bond, and bringing an action thereon againſt the pledges in the defendant's own name.

By the ſtatute, the ſheriff is ordered, at the requeſt and coſts of the avowant, or perſon making conuſance, to make an aſſignment.

1 Pull. & Boſ. 378. A replevin bond may be aſſigned to the avowant only, or he may bring his action upon it without joining the party making conuſance.

5 T. R. 195. A defendant in replevin is, indeed, entitled to an aſſignment of the bond, if the plaintiff in replevin do not appear in the County Court and proſecute according to the condition; which condition is not ſatisfied by a proſecution in the County Court, but the plaint, if removed by *reſale* into a ſuperior Court, muſt be proſecuted there with effect, and a return made, if adjudged there. In ſuch caſe the defendant may ſue on the bond as aſſignee of the ſheriff in the ſuperior Courts, though the replevin be not removed out of the County Court; averring in his declaration, that the

1 Pull. & Boſ. 410.

5 T. R. 195.

the plaintiff did not appear at the next County Court and profecute according to the condition of the bond.

The bond may be aſſigned four days excluſive after the time limited therein for plaintiff to profecute his ſuit. 2 Sell. Prac. 266.

The action muſt be brought in the ſame Court in which the *refalo* is returnable. The mode of aſſigning and proceeding is the ſame as on a bail-bond. *Ibid.* 267.

CHAPTER

CHAPTER XIX.

Remedies for Tenants againſt Landlords (continued.)

Of the Remedies for an unfounded, irregular, or exceſſive Diſtreſs.

SECTION I. *For Rent pretended to be Arrear.*

SECTION II. *For other ſuppoſed Right to diſtrain.*

IT has been ſeen that where the goods or cattle of a perſon have been taken as a diſtreſs, whether on the ground that they are liable for rent arrear or damage feaſeant, the party ſo diſtrained upon may conteſt the diſtrainer's right by an action of replevin; beſide that action, however, the law affords other remedies where the diſtreſs is unfounded, theſe are by action of treſpaſs *de bonis aſportatis*, or *quare clauſum fregit*, for damages, or trover for its value.

Treſpaſs *quare clauſum fregit* was the remedy commonly reſorted to of old, not merely as a remedy for a diſtreſs wrongfully taken, but as a means of trying the title to lands and tenements, the title frequently coming in queſtion in the courſe of that action: that action has of late years however been in ſome degree ſuperſeded by that of replevin in the one caſe, and ejectment in the other.

Still however, theſe actions of treſpaſs, and that of trover, are open to the party who means to conteſt the validity of a diſtreſs. The proceedings have in effect much ſimiliarity; but as in reſpect to proof of title (where the diſtreſs was for damage feaſant) the action of replevin is more ſtrict than that of treſpaſs for taking and carrying away the goods, the latter remedy is often preferred.

SECTION

Section I. *Remedies for unfounded Diſtreſs for Rent pretended to be Arrear.*

To entitle a man to bring treſpaſs, he muſt at the time when the act was done which conſtitutes the treſpaſs, either have the actual poſſeſſion in him of the thing which is the object of the treſpaſs, or elſe he muſt have a conſtructive poſſeſſion in reſpect of the right being actually veſted in him. Cro. Jac 46. 1 T. R. 480.

This action lies for an unlawful taking; as if the diſtreſs had been at night. So, if beaſts of the plough had been taken when other ſufficient diſtreſs could have been had. So, if doors have been broken open (or incloſures thrown down,) to make it, for the outer door can in no caſe be broken open, except under the direction of ſtat. 11 *G.* 2. *c.* 19. *ante.* p. 455.

But in a caſe of diſtreſs for rent, if the outer door is open, the perſon diſtraining may juſtify breaking open an inner door or lock to find any goods which are diſtrainable. Bull. N. P. [81.]

So, even where treſpaſs was for breaking and entering the plaintiff's houſe and taking his goods, and the caſe in evidence was, that the defendant having with him a conſtable, had entered the plaintiff's houſe to make a diſtreſs for rent. After he had told his buſineſs and began to take an inventory, the plaintiff's wife tore his paper, beat him and the conſtable out, and then blocked up the door: about an hour after the defendant with ſeveral others returned and demanded admittance, which being refuſed, he broke open the doors. It was ruled by Juſtice *Wilmot*, that the diſtreſs having been lawfully begun and not deſerted, but the defendant compelled to quit it by violence, that this was a recontinuance of the firſt taking and ſo was lawful, though he could not when he firſt came have ſo broken open the doors. Eſp. N. P. 382.

The ſtat. 2 *W.* & *M. ſeſs.* 1. *c.* 5. *s.* 5. provides "That in caſe any diſtreſs and ſale as aforeſaid, ſhall be made by virtue and colour of that Act, for rent pretended to be arrear and due, where in truth no rent is in arrear or due to the perſon or perſons diſtraining; or to him or them in whoſe name or names, or right ſuch diſtreſs ſhall be taken as afore- *Treſpaſs, or Caſe.* *ante.* p. 300, 2.

ſaid, that then the owner of ſuch goods or chattels diſtrained and ſold as aforeſaid, his executors or adminiſtrators, ſhall and may, by action of treſpaſs, or upon the caſe, to be brought againſt the perſons ſo diſtraining, any or either of them, his or their executors or adminiſtrators, recover double of the value of the goods or chattels ſo diſtrained and ſold, together with full coſts of ſuit."

Bull. N. P. 182. The plaintiff gave a note of hand for rent arrear, and took a receipt for it when paid, the defendant afterwards diſtrained for rent, the plaintiff brought treſpaſs; and it was holden, that notwithſtanding this note, the defendant might diſtrain, for it is no alteration of the debt till payment.—But if *A.* indorſe a note to *B.* for a precedent debt, and *B.* give a receipt for it as money when paid, yet if he neglect to apply to the drawer in time, and by his laches the note is loſt, it will extinguiſh the precedent debt, and in an action he would be nonſuited.

Ibid. If a landlord accept a bond for the rent, this does not extinguiſh it, for the rent is higher, and the acceptance of a ſecurity of equal degree is no extinguiſhment of a debt, as a ſtatute-ſtaple for a bond: but a judgment obtained upon a bond is an extinguiſhment of it.

Section II. *For other ſuppoſed Right to Diſtrain.*

Treſpaſs. If the diſtreſs was made for other ſuppoſed cauſe, than under pretence of rent arrear, when, in truth it was unfounded, treſpaſs alſo lies for the illegality.

Bull. N. P. 84. After judgment vacated, and reſtitution awarded, the defendant brought treſpaſs againſt the plaintiff for taking the goods, and the Court held that the action would lie; for by vacating the judgment it is as if it had never been, and is not like a judgment reverſed by writ of error.—But, in ſuch caſe, it would not lie againſt the ſheriff, who has the king's writ to warrant him; but the party muſt produce not only the writ, but the judgment.

Ibid. 89. Where the action is tranſitory (as treſpaſs for taking goods) the plaintiff is forecloſed to pretend a right to the place, nor can it be conteſted upon the evidence who had the right: therefore poſſeſſion is juſtification enough for the defendant, and it is ſufficient for him to plead that he was poſſeſſed

poſſeſſed of *Blackacre*, and that he took the goods damage feaſant without ſhewing title.—But it is otherwiſe in treſpaſs *quare clauſum fregit*, becauſe there the plaintiff claims the cloſe and the right may be conteſted.

Treſpaſs for taking and detaining his cattle at *Teddington*; the defendant juſtified taking them damage feaſant at *Kingſton*, and that he carried them to *Teddington* and impounded them there. It was objected on demurrer that the juſtification was local, and therefore the defendant ought to have traverſed the place in the declaration: *ſed non allocatur*, for when the defendant ſays he carried them to *Teddington*, and impounded them there, they agree in the place; for if the defendant had not a right to take them, he was a treſpaſſer at *Teddington*. *Ibid.* 90.

The general iſſue however, in treſpaſs, is "not guilty."

In treſpaſs *quare clauſum fregit*, the defendant may, upon "not guilty," give in evidence that he had a leaſe for years, (but not that he had a leaſe at will, for that is like a licence which may be countermanded at pleaſure,) or that his ſervant put the cattle there without his aſſent; but he cannot give in evidence a right of common, or to a way, or any other eaſement; nor can the defendant give in evidence that the plaintiff ought to repair his fences, for want whereof the cattle eſcaped; nor that he entered to take his emblements or cattle; nor that he entered in aid of an officer for execution of proceſs, or in freſh purſuit of a felon, or to remove a nuiſance, nor that it was the freehold of *A.* and that he entered by his command or licence; for theſe are all matters of juſtification only. *Ibid.*

So, the defendant cannot give in evidence, that the goods were ſeized as a heriot, or that they were diſtrained damage feaſant, *&c.* *Ibid.*

But he may give in evidence or plead that he was tenant in common with the plaintiff: but if he would take advantage of a ſtranger being ſo, he muſt plead it in abatement, for that will not prove him not guilty. So, if there be two defendants, they may plead a tenancy in common in one of them, with the plaintiff. *Ibid.* 91, 34.

With reſpect to the plea of *liberum tenementum*, and to a new aſſignment, if the defendant ſay that the *locus in quo* is *Ibid.* 92.

ſix acres in *D.* which are his freehold, and the plaintiff ſay they are his freehold, and in truth the plaintiff and defendant have both ſix acres there, the defendant cannot give in evidence, that he did the treſpaſs in his own ſoil, unleſs he give a name certain to the ſix acres, for otherwiſe (ſays *Dyer*, 23, *c.* 147.) the plaintiff cannot make a new aſſignment.

Ibid. It is certain, that where the action is tranſitory (as for taking the plaintiff's goods,) the defendant, if he would plead the *locus in quo* to be his freehold, and that he took the goods damage feaſant, muſt aſcertain the place at his peril; becauſe by his plea he has made that local which was at large before; for the taking of the goods is the gift of the action, and therefore the plaintiff may prove it at a different place from that land in the declaration.

1 Bl. R. 1089. Indeed it ſhould ſeem that antiently, upon a writ of *quare clauſum fregit*, the plaintiff might, and may ſtill, declare either generally, for breaking his cloſe at *A.* or might name the cloſe in his count, as for breaking and entering his cloſe called *Blackacre* in *A.* or might otherwiſe certainly deſcribe the ſame. If he declared generally, and the defendant pleaded the general iſſue, the plaintiff might give evidence of a treſpaſs in any part of the townſhip of *A.* So, that for the advantage of the defendant and to enforce the plaintiff to aſcertain the place exactly, a method was deviſed of permitting the defendant to plead what is called "the common "bar," that is, to name any place, as *Broomfield* (true or falſe was immaterial) in *A.* as the place where the ſuppoſed treſpaſs happened, and then alledge that ſuch place ſo named was the defendant's own freehold: and as the plaintiff could not prove a treſpaſs in *Broomfield*, this drove him to a new aſſignment of the *locus in quo*, by naming the place in certain, as a cloſe called *Blackacre*, to which the defendant was now to plead afreſh.

Bull. N. P. 92. In treſpaſs, the defendant juſtified in a place called *A.* as his freehold; the plaintiff, by way of new aſſignment ſaid that the place in which, *&c.* is called *B.* It is no plea to ſay that *A.* and *B.* are the ſame place, for by the new aſſignment the bar is at an end.

Ibid. If the plaintiff make a new aſſignment, and the general iſſue

iſſue be joined thereon, the plaintiff cannot prove the defendant guilty at the place mentioned in the bar: for when the plaintiff makes a new aſſignment he waives that whereto the defendant pleaded in bar; ſo as in truth if it be the ſame place, he can never take advantage thereof, and therefore if it be the ſame, yet the defendant ought not to rejoin that it is ſo, but plead not guilty, and take advantage of it at the trial.

If the plaintiff make a new aſſignment and the general iſſue be joined thereon, the plaintiff cannot prove the defendant guilty at the place mentioned in the bar; for when the plaintiff makes a new aſſignment, he waives that whereto the defendant pleaded in bar; ſo as in truth if it be the ſame place, he can never take advantage thereof, and therefore if it be the ſame, yet the defendant ought not to rejoin that it is ſo, but plead not guilty, and take advantage of it at the trial. *Ibid.*

A man is not obliged to juſtify a diſtreſs for the cauſe which he happens to aſſign at the time it was made. If he can ſhew that he had a legal juſtification for what he did that is ſufficient. A man may diſtrain for one thing and avow for another: thus, he may diſtrain for rent and avow for heriot ſervice. 7 T. R. 657.

On a juſtification for taking cattle damage feaſant, if it appear that the party diſtraining had not actually got into the *locus in quo* before the cattle had got out of it, the juſtification cannot be ſupported. 1 Eſp. N. P. 95.

In treſpaſs for taking and driving plaintiff's cattle, to which there was a juſtification, that defendant was lawfully poſſeſſed of a certain cloſe, and that he took the cattle damage feaſant, plaintiff may ſpecially reply title in another by whoſe command he entered, *&c.* and it does not vitiate the replication that it is unneceſſarily proved, and farther to give colour to the defendant. 1 Eſp. R. 212.

For as treſpaſs is a poſſeſſory action, it is enough for the plaintiff in his replication to traverſe the title ſet out by the defendant, without ſetting up a title in himſelf; for the poſſeſſion admitted in the plea in giving colour is ſufficient unleſs the defendant can make out a title in himſelf.—But if in treſpaſs for taking a gelding, (or other chattel,) the de- Bull. N. P. 93.

fendant pleads that the place where is one hundred acres, and that *J. S.* is ſeiſed thereof in fee, and that he as his ſervant and by his expreſs orders took the gelding (or other chattel) damage feaſant; the plaintiff cannot reply *de injuria ſua propria abſq. tali cauſa*, for that would put in iſſue three or four things; but he muſt traverſe one thing in particular.

Ibid. 94. If the defendant plead that it is his freehold, the plaintiff may reply three ways: 1. that it is his freehold, and then he muſt always traverſe the defendant's plea, except in one caſe, and that is where he makes a new aſſignment. 2. Or he may derive a title under the defendant, and then he muſt not deny its being the defendant's freehold. 3. He may ſet up a title not inconſiſtent with the defendant's, and then he may either traverſe the defendant's title, or not, as he pleaſes.

Ibid. 85. It is not neceſſary to have an intereſt in the ſoil, to maintain treſpaſs *quare clauſum fregit*, but an intereſt in the profits is ſufficient, as he who has *prima touſura*. So, if *J. S.* agree with the owner of the ſoil to plough and ſow the ground, and for that to give him half the crop, *J. S.* may have his action for treading down the corn, as the owner is not jointly concerned in the growing corn, but is to have half after it is reaped by way of rent, which may be of other things than money: though in *Co. Lit.* 142, it is ſaid it cannot be of the profits themſelves; but that (as it ſeems) muſt be underſtood of the natural profits.

Ibid. 86. The plaintiff may prove treſpaſs at any time before the action brought, though it be before or after the day laid in the declaration. But in treſpaſs with a *continuando*, the plaintiff ought to confine himſelf to the time in the declaration; yet he may waive the *continuando*, and prove a treſpaſs on any day before the action brought, or he may give in evidence only part of the time in the *continuando*.

Ibid. 84. The plaintiff can only prove the taking ſuch goods as are mentioned in the declaration; becauſe a recovery in the action could not be pleaded in bar to any other action brought for taking other goods than thoſe ſpecified in the declaration. Therefore, where the declaration was for entering

tering the plaintiff's houſe, and taking *diverſa bona et catalla ipſius querentis ibidem inventa*, after verdict for the plaintiff the judgment was arreſted.

By ſtat. 21 *J.* 1. *c.* 16. the defendant may to treſpaſs *quare clauſum fregit*, plead a diſclaimer, and that the treſpaſs was by negligence or involuntary, and tender of ſufficient amends before the action brought; whereupon, or upon ſome of them the plaintiff ſhall be enforced to join iſſue: and if the ſaid iſſue be found for the defendant, or the plaintiff ſhall be nonſuited, the plaintiff ſhall be clearly barred from the ſaid action, and all other ſuits concerning the ſame.

Though the verdict do not agree with the plea in the manner and nature of the tenure, yet if he agrees in ſubſtance in the point for which the diſtreſs was made, that is ſufficient, for there is a difference between treſpaſs and replevin, for in replevin it behoves the avowant to make a good title *in omnibus*. Bull. N. P. 56.

Thus in treſpaſs for breaking and entering the plaintiff's houſe and taking his goods, the defendant pleaded, that the houſe is parcel of a half yard holden of *A.* by homage, fealty, eſcuage, uncertain ſuit of Court, encloſing his park with pales, and rent of a pound of comyn, and for three year's arrear, and for homage and fealty of the tenant, he by *A's.* command entered and took, *&c.* the defendant traverſed the tenure *modo et formâ*. Special verdict that he held of *A.* by homage, fealty, encloſing his park; rent of a pound of comyn, *et non aliter*, and judgment for the defendant. *Ibid.* 56.

In treſpaſs for taking the plaintiff's cattle, juſtification that they were damage feaſant in the defendant's cloſe is ſufficient, without ſetting forth a title. 10 Mod. 37.

If treſpaſs for taking and ſelling the plaintiff's goods be brought againſt two perſons, and the one ſuffers judgment to go by default, and the other juſtifies *the taking* on a diſtreſs for rent, by command of his co-defendant, and *the ſelling* by the licence of the plaintiff, and iſſue be taken on the licence and found for the defendant, the judgment ſuffered by default ſhall be arreſted: for the caſe of a licence 8 Mod. 217: 2 Ld. Raym. 1372. *s. c.* 1 Str. 610. *s. c.*

cannot be diſtinguiſhed from a gift of goods, or a releaſe, which deſtroys the cauſe of action as to all the defendants.

7 T. R. 660. Where an action *de bonis aſportatis* has been brought full coſts have always been allowed to the plaintiff notwithſtanding he may have received leſs than 40*s.* not becauſe the ſtatute [22 & 23 *C.* 2. *c.* 9.] has ſaid that he ſhall have full coſts, but becauſe the caſe is not within the Act. The rule both in C. P. and K. B. is that where there is a ſpecial plea of juſtification found againſt the defendant, the plaintiff is entitled to his full coſts. The principle upon which ſuch determinations are founded is, that where the caſe is ſuch that the Judge who tries it cannot in any view of it grant a certificate within the Act, it is conſidered to be a cauſe out of the ſtatute.

Tidd's. Pract. 653. But where the plea or iſſue, though ſpecial, is collateral to the queſtion of freehold or title to the land, as where the defendant juſtifies an entry as bailiff under proceſs, and iſſue is joined upon the door's being ſhut, or where upon a plea of a diſtreſs for rent, there is an iſſue on the defendant's being bailiff, a certificate is neceſſary, to entitle the plaintiff to full coſts: and it is alſo neceſſary where the plaintiff recovers leſs than 40*s.* damages, on a replication of *extra viam*, or plea of non-guilty to a new aſſignment: but where the plaintiff is entitled to coſts upon a new aſſignment, he is entitled to the coſts of all the previous pleadings.

Ibid. None of the ſtatutes, made for reſtraining the plaintiff's right to coſts, extend to actions brought in an inferior Court, and removed by the defendant into a ſuperior one: and it has been holden, that the 21 *J.* 1. *c.* 16. and the 22 & 23 *C.* 2. *c.* 9. only reſtrain the Court from awarding more coſts than damages; but the jury, not being reſtrained thereby, may give what coſts they pleaſe.

Trover. Trover alſo lies for a diſtreſs illegally taken; as where a right to diſtrain exiſts, but the diſtrainer (where the diſtreſs is for rent) take ſuch goods as are not lawfully the ſubjects of a diſtreſs; as wearing apparel in uſe, *&c.*

6 T. R. 298. So, if a party pay money in order to redeem his goods from a wrongful diſtreſs for rent (or any other ſuppoſed ground

ground of diſtreſs, it is preſumed,) he may maintain trover againſt the wrong-doer.

For trover is a ſpecial action on the caſe, which one man may have againſt another, who hath in his poſſeſſion any of his goods by delivery, finding, or *otherwiſe*, or ſells or makes uſe of them without his conſent, or refuſes to deliver them on demand; and it is for recovery of damages to the value of the goods; and therefore a declaration ought to contain convenient certainty in the deſcription of the things, ſo that the jury may know what is meant thereby. Bull. N. P. 32.

The converſion is the gift of the action, and the manner in which the goods came to the hands of the defendant is only inducement; and therefore the plaintiff may declare upon a *devenerunt ad manus* generally, or ſpecially *per inventionem*, (though the defendant came to the goods by delivery,) for being but inducement, ſuch need not be proved; but it is ſufficient to prove property in himſelf, poſſeſſion to have been in the defendant, and a converſion by him. So, the declaration was holden to be good, though the converſion was laid to be on a day before the trover, for the *poſtea convertit* is ſufficient, and the *viz.* void. *Ibid.* 33.

The diſtinction between the actions of treſpaſs and trover is well ſettled; the former is founded on poſſeſſion, the latter on property: a ſpecial property is ſufficient in order to enable the party to bring trover; and even property is ſufficient without poſſeſſion. 4 T. R. 489. Bull. N. P. 33.

Trover being founded on a tort, "not guilty" is the general iſſue. A releaſe alſo may be pleaded ſpecially, and it ſeems is the only ſpecial plea in this action. But as the defendant cannot plead the ſpecial matter, he may give it in evidence on the general iſſue. *Ibid.* 48.

Where the goods are cumbrous, inſtead of allowing them to be brought into Court, the Court will grant a rule to ſhew cauſe why, on the delivery of the goods to the plaintiff and paying coſts, proceedings ſhould not be ſtaid. *Ibid.* 49.

Treſpaſs, or Caſe, for an irregular Diſtreſs.

Treſpaſs will alſo lie for any irregularity in making the diſtreſs, or in the ſubſequent diſpoſition of it, or conduct reſpecting it.

Therefore,

1 Eaſt. R. 139. Therefore, treſpaſs lies againſt a landlord, who, on making a diſtreſs for rent, turned plaintiff's family out of poſſeſſion, and kept the premiſſes on which he had impounded the diſtreſs.

Ante, p. 304. But reſpecting a diſtreſs for rent, by ſtat. 11 *G.* 2. *c.* 19. a diſtreſs for rent ſhall not be deemed unlawful for any irregularity in the diſpoſition of it afterward, nor the party making it a treſpaſſer *ab initio:* but the party aggrieved may recover full ſatisfaction for the ſpecial damage he ſhall have ſuſtained thereby, and no more, in an action of treſpaſs or on the caſe, unleſs tender of amends have been before made.

Action on the Caſe for an exceſſive Diſtreſs.

7 T.R. 658. *ante*, 299, 300. As to an exceſs of a diſtreſs taken, an action on the caſe lies for that on the ſtatute of *Marlbridge*, 52 *H.* *c.* 1. but that will not warrant an action of treſpaſs.

Bull.N.P. [81.] Thus in treſpaſs for breaking and entering his houſe, and taking an exceſſive diſtreſs, after judgment by deſault, it was holden, on error brought, that treſpaſs would not lie, for the entry was lawful, and there is nothing ſubſequent to make it a treſpaſs, as there is when the diſtreſs is abuſed. At common law the party might take a diſtreſs of more value than the rent, therefore that did not make him a treſpaſſer *ab initio*, but the remedy ought to be by a ſpecial action founded upon the ſtatute of *Marlbridge*.

CHAPTER

CHAPTER XX.

Of the Remedies for Tenants againſt Landlords (continued.)

Of the Tenant's Remedies by Action of Covenant or Aſſumpſit, *according as the Leaſe is by Deed or without Deed.*

IF the landlord commit a breach of covenant if the leaſe be by deed, or violate his contract if the leaſe be by writing without deed, or by parol agreement, the tenant may in the one caſe ſue him for damages in an action of covenant, and in the other in that of *aſſumpſit.*

A breach of covenant need not be aſſigned in expreſs words; it is ſufficient if it be a direct affirmative, and certain to a general intent. Cro. Jac. 383. 4 T. R. 621.

Therefore, on a covenant that the defendant had a right to let for the term, a breach aſſigned generally that he had not a right to let is good; for the covenant being general, the breach may be aſſigned as general as the covenant, and it lies not in the plaintiff's notice who had the rightful eſtate; but the defendant ought to have maintained, that he was ſeiſed in fee, and had a good eſtate to demiſe, and then the plaintiff ought to have ſhewn a ſpecial title in ſome other; but *primâ facie* the count is good, the covenant being general, to aſſign a general breach. Cro. Jac. 304. cont. ſemb. 1 Mod. 66.

So, in aſſigning a breach of covenant that was for quiet enjoyment, it was held to be ſufficient that at the time of the demiſe to the plaintiff, *A.* had lawful right and title to the premiſſes, and having ſuch lawful right and title entered, *&c.* and evicted him, *&c.* without ſhewing what title *A.* had; or that he evicted the plaintiff by legal proceſs, *&c.* Alledging that " the party having a lawful right " and 4 T. R. 621. 1 Mod. 101.

" and title, entered," is equivalent to ſaying " he entered " by lawful right and title."

Cro. Eliz. 213. So alſo, if a covenant be againſt the act of any particular perſon, interruption aſſigned as a breach is good, without ſhewing by what title.

1 T. R. 671. So, if a leſſor covenant to quiet enjoyment againſt the *lawful* let, ſuit, entry, *&c.* of himſelf, his heirs, and aſſigns, the declaration for a breach of the covenant, need not expreſsly alledge that he entered claiming title, if the diſturbance complained of is ſuch as clearly appears to be an aſſertion of right.

Cro. Jac. 383. On a covenant that *A.* and his wife ſhall enjoy, *&c.* a breach that *A.* was ouſted is ſufficient.

Ibid. 425. However, to eſtabliſh a breach of covenant for quiet enjoyment without incumbrance from any perſon, the plaintiff muſt ſhew a lawful incumbrance.

Ibid. 421. Cro. Eliz. 914-916. A condition that the leſſee ſhall not moleſt, vex, *&c.* any copyholder, is not broken by an entry on the premiſſes *vi et armis* to beat him, if he do not ouſt him from his copyhold.

Ibid. 316. A covenant in a leaſe, that the leſſee ſhould quietly enjoy the eſtate diſcharged from tithes, is broken by a ſuit for them, after the expiration of the term.

2 Vent. 212. But where in covenant for quiet enjoyment the breach aſſigned was, " that the defendant had exhibited a bill in " Chancery againſt him for ploughing meadow, and ob- " tained an injunction, which had been diſſolved with *20s.* " coſts;" on demurrer, this was held to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a ſuit for waſte.

Where a covenant is founded on a conveyance of an eſtate which proves to be void, the covenant is void alſo.

Sir T. Raym. 27. Thus, where the conveyance was " a grant of ſo much " of a term as ſhould be unexpired at the death of *A.*" and covenant for quiet enjoyment, and bond for performance of covenants: this conveyance being void, on account of the uncertainty of the time when the term was to commence and end [*Co. Lit.* 456.] the covenants were adjudged to be void as they depended on the eſtate.

But

But though a leaſe be void, covenant lies in certain caſes for a breach of covenant before the leaſe became void.

Thus, upon the ſtat. 13 *Eliz. c.* 20. of leaſes made by parſons, that upon non-reſidency for eighty days the leaſe ſhall be void, yet it was adjudged, that where a parſon made ſuch a leaſe by indenture, in which were divers covenants on the leſſee's part, and after the leaſe, *&c.* became void by non-reſidency, *&c.* for a covenant broken before, an action of covenant lay. Cro. Eliz. 78.

CHAPTER

CHAPTER XXI.

Of the Remedies for Tenants againſt third Perſons.

SECTION I. *Of Diſtreſs for Damage Feaſant, and Reſcous.*

SECTION II. *Of Treſpaſs for immediate Injuries to his Poſſeſſion; and Caſe for conſequential ones.*

SECTION I. *Of Diſtreſs for Damage Feaſant; and Reſcous.*

IF the enclosures, *&c.* of the tenant be broken down, or his land injured by the cattle, *&c.* of another perſon, he may either bring an action of treſpaſs for the damage done, or he may take the cattle, *&c.* as a diſtreſs damage feaſant;
12 Mod 663. for the party has his election of the two remedies: but uſing one of them is an utter waiver of the other, as the election of one cannot but be conſidered to be an implied rejection of the other; beſide that *nemo debet bis vexari pro eadem cauſâ:* a diſtreſs, therefore, taken damage feaſant, as long as it is detained, is a good bar to treſpaſs.

Ibid. 661. If a beaſt has done more damage than he is worth, let the injured party not diſtrain, but rather take his action.

This ground of diſtreſs is upon the principle of the law of recompence, which juſtifies the party in retaining that which occaſions an injury to his property, till amends be made by the owner.

12 Mod. 661. Damage feaſant, however, is the ſtricteſt diſtreſs that is, for the thing diſtrained muſt be taken in the very act, for if they are once off, though on freſh purſuit, you cannot diſtrain them: this diverſity exiſting between diſtreſs for rent and damage feaſant, that one may diſtrain any cattle he finds on the premiſſes for rent, but in the other caſe they muſt be actually doing damage, and are only diſtrainable

for the damage they are then doing and continuing; for if they have done damage to-day and gone off, and come again at another time and are doing damage, and are taken for that, and the owner tender amends for that damage, the party cannot juſtify keeping them for the firſt damage.

Moreover, if ten head of cattle are doing damage, one cannot take one of them and keep it for the whole damage, but may bring treſpaſs for the reſt. *Ibid.*

For damage feaſant one may diſtrain in the night, otherwiſe it may be the beaſts will be gone before he can take them: in which reſpect, this diſtreſs differs from that for rent, or rent-ſervice, which muſt be in the day-time. Co. Lit. 142.

If the diſtreſs be ſtolen or ſet at large by a ſtranger, the diſtrainer ſhall not be anſwerable for it; but if in that caſe, replevin be brought and an *elongatur* returned, as there muſt be, there ſhall be a withernam, and the diſtrainer is liable till he ſhew the matter, which being no default of his will excuſe him. 12 Mod. 660.

If tender be made of damages before the taking, the taking is unlawful; if after the taking and before impounding, then the detainer after is unlawful; but tender comes too late after the impounding to make either the taking or detaining unlawful: ſtill, however, after the impounding, the diſtrainer may take the amends, and let go the diſtreſs if he pleaſe.

If a diſtreſs damage feaſant eſcape, or die, without any neglect of the diſtrainer, he may have an action of treſpaſs againſt the owner.

In treſpaſs *quare clauſum fregit*, the defendant pleaded, that the plaintiff diſtrained his hog damage feaſant for the ſame treſpaſs; the plaintiff replied, that the hog eſcaped without his conſent, and that he was not ſatisfied for the damage: on demurrer, it was holden, that the action would not lie, though it was admitted that if the diſtreſs had died, the action would revive; but the eſcape (unleſs the contrary be ſhewn) was the fault of the plaintiff. Bull. N. P. 84.

Of Reſcous.

Reſcous is where the owner, or other perſon, takes away by force a thing diſtrained from the perſon diſtraining, but the *Ibid.* 61.

the perſon muſt be actually in poſſeſſion of the thing, or elſe it is no reſcous; as if a man come to make a diſtreſs, and he be diſturbed to do it: but the party may bring an action for this diſturbance.

Ibid. The plaintiff ought to count for what rent or ſervices he took the diſtreſs, and the defendant may traverſe the tenure.

Ibid. If a man ſend his ſervant to diſtrain for rent, *&c.* and reſcous be made, the maſter ſhall have the writ, and he may join in the writ for aſſault and battery of the ſervant; for both are torts.

Ibid. 62. If the defendant plead "Not guilty," which is the general iſſue, he cannot give in evidence non-tenure of the plaintiff who diſtrained for rent, but he ought to plead it.

Ibid. But this action is rarely brought at this day, but a ſpecial action on the caſe in which non-tenure might [may] be given in evidence on the general iſſue.

Vide ante, p. 298, 302, 3. touching ſtat. 2 *W. & M. c.* 5. *s.* 4. *&c.*

SECTION II. *Of Treſpaſs for immediate Injuries to the Tenant's Poſſeſſion.*

Ibid. 79. Where the immediate act itſelf occaſions a prejudice, or is an injury to the houſe, land, *&c.* of another, treſpaſs *vi et armis* will lie.

Cro. Jac. 123. 3 Bur. R. 1563. This is a poſſeſſory action; therefore, whoever is in poſſeſſion may maintain an action of treſpaſs againſt a wrong-doer to his poſſeſſion.

Ibid. 1 Ld. Raym. 188. Therefore, where a party being entitled under a leaſe from the Crown to the ſole right of digging lead in a certain diſtrict, to the ſoil of which ſhe had no right, let to the plaintiff all her right ſo to dig during her term; upon his bringing treſpaſs on the caſe againſt the defendant for taking the lead, it was held that, being in poſſeſſion, he ſhould have brought treſpaſs *vi et armis*; wherefore he was nonſuited.

Ibid. 1827. So, treſpaſs *vi et armis* lies for one who has the profits of the ſoil, though not the ſoil itſelf; as *herbagium*, *paſtura*, &c.

It lies againſt a wrong-doer, even though the tenant's poſſeſſion be void.

Therefore,

Therefore, one in poſſeſſion of glebe land under a leaſe 1 East's R. 212.
void by ſtat. 13 *Eliz. c.* 20. by reaſon of the rector's non-reſidence, may yet maintain treſpaſs upon his poſſeſſion againſt a wrong-doer.

Note. Where there is a demiſe of premiſſes, and an en- 3 Eſp. R. 78.
tire rent reſerved, if any part of the premiſſes could not be legally demiſed, the whole demiſe is void.

As treſpaſs is a poſſeſſory action, and poſſeſſion is ſuf- Cro. Jac. 123.
ficient to maintain it againſt a ſtranger, no ſpecial title need be made.

Treſpaſs lies againſt a perſon for diſturbing the plaintiff *Ibid.*
in the profits of a fair by erecting a toll-booth, without ſaying *quare clauſum fregit.*

The ſtat. 16 & 17 *Car.* 2. ſays, that if in an action of treſpaſs the plaintiff happen to omit the words *vi et armis* or *contra pacem*, the want of thoſe words ſhall not vitiate the declaration.

If there is leſſee for life or years of lands, the leſſee has Eſp. N. P. 384.
no property in the trees growing on the land, and even if 4 Co. 62. *a.*
the clauſe in the leaſe is "without impeachment of waſte," it gives no property, but is merely an exemption from an action. Yet if a ſtranger cuts down any trees, the leſſee may maintain treſpaſs, but he ſhall not recover damages for the value of the trees, becauſe the property of them is in him in reverſion; but the damages ſhall be for cropping and breaking his cloſe, and perhaps for the loſs of ſhade, &c.

This action alſo lies for not repairing fences, whereby 1 Salk. 335.
cattle come into ground of the tenant and do damage.

Every man's ground is, in the eye of the law, fenced; 10 Mod. 140.
Par. Off. 188.
and where a hedge and ditch join together, in whoſe ground or ſide the hedge is, to the owner of that land belongs the keeping of the ſame hedge or fence, and the ditch adjoining to it on the other ſide, in repair and ſcoured.

Where entry, authority, or licenſe, is given to any one Bull. N. P. 81.
by the law and he abuſes it, he will be a treſpaſſer *ab initio*; but where it is given by the party, he may be puniſhed for the abuſe, but he will not be a treſpaſſer *ab initio*.

Where the plaintiff is in the actual occupation of the Peake's R. 67.
cloſe, though he had no legal title whatever, the defendant cannot give evidence of property in a ſtranger under the

general iſſue: but where land is not in the actual poſſeſſion of any perſon, as commons and the like, the defendant, on ſuch iſſue, may prove the *legal* poſſeſſion to be in a third perſon.

F. N. B. 87. B. &c. Com. Dig. tit. Treſpaſs (A. 2.)

It will be a treſpaſs, if a man wrongfully enters the houſe, lands, or tenements of another without his conſent; and therefore treſpaſs lies *de domo ſuo fractâ*. So, for entering his meſſuage or tenement. Or breaking his cloſe. Or treading down, ſpoiling, eating, *&c.* his hay or corn. Or cutting down trees. Or hunting in his cloſe. Or breaking hedges or ditches. Or throwing down or diſturbing the ſetting of his fold. Or breaking up his pond. So if a man enters and does damage to another, though he does not keep the poſſeſſion; as treſpaſs lies *quare domum vel clauſum fregit.*

Bro. Treſp. 456.

The leſſee for years, after his leaſe is expired, may have action for a treſpaſs on the land before his leaſe was ended.

11 Mod. 281.

The action of treſpaſs is local.

4 T. R. 503. Bull. N. P. 86. *Ante p.* 502.

The plaintiff may prove treſpaſs at any time before the action brought, though it be before or after the day laid in the declaration. But in treſpaſs with a *continuando*, the plaintiff ought to confine himſelf to the time in the declaration: yet he may waive the *continuando*, and prove the treſpaſs on any day before the action brought, or he may give in evidence only part of the time in the *continuando*.—*Note.* That of acts which terminate in themſelves, and once done cannot be done again, there can be no *continuando*; as hunting or killing a hare, or five hares, but that ought to be alledged, that *diverſis diebus ac vicibus* between ſuch a day and ſuch a day, he killed five hares, and cut and carried away twenty trees. Where treſpaſs is laid in continuance that cannot be continued, exception ought to be taken at the trial, for he ought to recover but for one treſpaſs; but hunting may be continued, as well as ſpoiling and conſuming graſs.

Ibid.

Whether the treſpaſs may be laid with a *continuando* or not, depends much upon the conſideration of good ſenſe; as where treſpaſs is brought for breaking a houſe or hedge, it may well be laid with a *continuando*, for pulling away every brick or ſtick is a breach: but if the declaration be that

that the defendant threw down twenty perches of hedge *continuando tranſgreſſionem prædictam* from ſuch a day to ſuch a day, this muſt be intended of a proſternation done at the firſt day, and therefore will be ill upon demurrer or judgment by default; but it will be aided by verdict, becauſe the Court will intend that the jury gave no damage for the *continuando*.

So, treſpaſs cannot be laid of looſe chattels with a *continuando*, and if it be ſo laid no evidence can be given but of the taking at one day; and therefore in treſpaſs for meſne proceſs it ought to be laid *diverſis diebus ac vicibus*. Where ſeveral treſpaſſes are laid in one declaration, *continuando tranſgreſſiones prædictas*, and ſome of them may be laid with a *continuando* and ſome not, after verdict the *continuando* ſhall be extended only to the treſpaſſes which may be laid with a *continuando*. So, where the *continuando* is impoſſible, the Court will intend that no damages were given for it. *Ibid.*

A ſpecial juſtification muſt be of matter of fact, and not of record; for matter of record muſt be pleaded even by an officer. 6 Mod. 40.

Regularly, indeed, by the common law, matter of excuſe or juſtification muſt be pleaded ſpecially; as in treſpaſs to real property, a licence; or that the beaſts came through the plaintiff's hedge, which he ought to have repaired; or by reaſon of a rent-charge, common, or the like. Tidd's Pract. 380.

A juſtification in treſpaſs muſt, it is ſaid, anſwer the whole treſpaſs as laid in the declaration.

Therefore, where treſpaſs was for going over the plaintiff's cloſe with horſes, cows, and ſheep, and the defendant juſtified, that he had a way for horſes, cows, and ſheep, and ſaid, that ſuch a day he went over with horſes, upon demurrer it was adjudged ill, for it was a juſtification for horſes only. 11 Mod. 219.

In treſpaſs, the value of the damages muſt be ſtated and proved. 6 Mod. 153.

Judgment recovered againſt another for the ſame injury is a good plea in bar to this action. Cro. Eliz. 30.

In actions of tort, as treſpaſs, *&c.* where the wrong is joint and ſeveral, the diſtinction ſeems to be this; that Tidd's Pract. 592.

Of the Judgment and Damages.

where the plea of one of the defendants is ſuch as ſhews that the plaintiff could have no cauſe of action againſt any of them, there if this plea be found againſt the plaintiff, it ſhall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages againſt thoſe who let judgment go by default; but where the plea merely operates in diſcharge of the party pleading it, there it ſhall not operate to the benefit of the other defendants, but notwithſtanding ſuch plea be found againſt the plaintiff, he ſhall have judgment and damages againſt the other defendants.

Ibid. If there be a demurrer to part and an iſſue upon other part, or, in an action againſt ſeveral defendants, if ſome of them demur and others plead to iſſue, the jury who try the iſſue ſhall aſſeſs the damages for the whole, or againſt all the defendants. In this caſe, if the iſſue be tried before the demurrer is argued, the damages are ſaid to be contingent, depending upon the event of the demurrer. But where the iſſue, as well as the demurrer, goes to the whole cauſe of action, the damages ſhall be aſſeſſed upon the iſſue, and not upon the demurrer.

Ibid. 593. Where there are ſeveral defendants who ſever in pleading, the jury who try the firſt iſſue ſhall aſſeſs damages againſt all, with a *ceſſet executio*; and the other defendants, if found guilty, ſhall be contributory to thoſe damages. In treſpaſs againſt ſeveral defendants who join in pleading, if the jury on the trial find them all jointly guilty, they cannot aſſeſs ſeveral damages. But they may find ſome of them guilty and acquit others; in which caſe the damages can be aſſeſſed againſt thoſe only who are found guilty: or they may find ſome of the defendants guilty of the whole treſpaſs, and others of part only; or ſome of them guilty of part, or at one time, and the reſt guilty of other part, or at another time; in either of which caſes, they may aſſeſs ſeveral damages.

Ibid. 594. Alſo, where in an action againſt ſeveral defendants the jury by miſtake have aſſeſſed ſeveral damages, the plaintiff may cure it, by entering a *nolle proſequi* as to one of the defendants, and taking judgment againſt the others; or he may enter a *remittitur* as to the leſſer damages; or, even

withou

without entering a *remittitur*, he may take judgment againſt all the defendants for the greater damages.

Where the jury upon the trial of an iſſue have omitted to aſſeſs the damages, the omiſſion may in certain caſes be ſupplied by writ of enquiry. Where they give greater damages than the plaintiff has declared for, it may be cured by entering a *remittitur* of the ſurplus before judgment. *Ibid.*

As to coſts, the ſtat. 22 & 23 *Car.* 2. *c.* 9. enacts "That "in all actions of treſpaſs, wherein the Judge, at the trial "of the cauſe, ſhall not find and certify, under his hand, "upon the back of the record, that the freehold or title "of the land mentioned in the plaintiff's declaration was "chiefly in queſtion; the plaintiff, in caſe the jury ſhall "find the damages to be under the value of forty ſhillings, "ſhall not recover or obtain more coſts of ſuit than the "damages ſo found ſhall amount unto." *Of the Coſts.*

The conſtruction of this ſtatute, which now prevails, is that the ſtatute is confined to actions of aſſault and battery, (which action is compriſed in it) and actions for *local* treſpaſſes, wherein it is poſſible for the Judge to certify that the freehold or title of the land was chiefly in queſtion. In actions, therefore, for local treſpaſſes, the ſtatute applies, whenever an injury is done to the freehold, or to any thing growing upon or affixed to the freehold: and in a modern caſe it was carried ſtill further.—That was an action of treſpaſs *quare clauſum fregit*; the firſt count ſtated, that the defendants broke and entered the cloſe of the plaintiffs, and the graſs of the plaintiffs there then growing, with the feet in walking, trod down, ſpoiled, and conſumed, and dug up and got divers large quantities of turf, peat, ſods, heath, ſtones, ſoil, and earth of the plaintiffs, in and upon the place in which, &c. and *took and carried away* the ſame, and converted and diſpoſed of the ſame to their own uſe. Another count was upon a ſimilar treſpaſs in another cloſe. The defendants pleaded the general iſſue to the whole declaration, and two ſpecial pleas to the ſecond count. On the trial, a verdict was found for the plaintiffs on the general iſſue, with one ſhilling damages; and for the defendants on the ſpecial pleas; and the Judge had not certified. *Ibid.* 648. Doug. 779.

Per Lord *Mansfield*—" The queſtion on this record is, " whether the plaintiffs are entitled to any more coſts than " damages under the ſtat. 22 & 23 *C.* 2. *c.* 9.? There is a " puzzle and perplexity in the caſes on this part of the " ſtatute, and a jumble in the reports; and as the queſtion " is a general one, we thought it proper to conſult all the " Judges; and they are all of opinion, that this caſe is " within the ſtatute, and that the plaintiffs ought to have " no more coſts than damages. You will obſerve, that " what has been called an *aſportavit* in this declaration is a " mode or qualification of the injury done to the land. " The treſpaſs is laid to have been committed on the land " by digging, *&c.* and the *aſportavit* as part of the ſame " act, and on the trial of the iſſue, the freehold certainly " might have come in queſtion. This is clearly diſtin- " guiſhable from an *aſportavit* of perſonal property, where " the freehold cannot come in queſtion, and which there- " fore is not within the Act. Thus after trees are cut " down, and thereby ſevered from the freehold, if a treſ- " paſſer comes and carries them away, that caſe is not " within the ſtatute, becauſe the freehold cannot come in " queſtion: here it might."

Tidd's Pract. 850.

Where an injury is done to a perſonal chattel, it is not within the ſtatute; nor where an injury to a perſonal chattel is laid, in the ſame declaration, with aſſault and battery, or a local treſpaſs; conſequently, in theſe caſes, though the damage be under forty ſhillings, the plaintiff is intitled to full coſts, with a certificate.—But then it muſt be a ſubſtantive and independent injury: for where it is laid or proved merely in aggravation of damages, as a mode or qualification of the aſſault and battery, or local treſpaſs, or there is a verdict for the defendant upon that part of the declaration which charges him with an injury to a perſonal chattel; it is within the ſtatute.

The certificate required by this ſtatute need not, it ſeems, be granted at the trial of the cauſe.—The award of an arbitrator is not tantamount to a Judge's certificate under this ſtatute.

The ſtat. 4 & 5 *W.* & *M.* *c.* 23. *s.* 10. after reciting that great miſchiefs enſue by inferior tradeſmen, apprentices,

and other diſſolute perſons, neglecting their trades and employments, who follow hunting, fiſhing, and other game, to the ruin of themſelves and damage of their neighbours, enacts, "That if any ſuch perſon ſhall preſume to hunt, "hawk, fiſh, or fowl, (unleſs in company with the maſter "of ſuch apprentice, duly qualified by law,) ſuch perſon "ſhall be ſubject to the penalties of this Act, and ſhall or "may be ſued or proſecuted for his wilful treſpaſs, in ſuch "his coming on any perſon's land; and if found guilty "thereof, the plaintiff ſhall not only recover his damages "thereby ſuſtained, but his full coſts of ſuit; any former "law to the contrary notwithſtanding." The words *Ibid.* 654.
"inferior tradeſmen" extend, it ſeems, to every tradeſman not qualified to kill game: but this was doubted in a ſubſequent caſe, wherein the Judges were divided in opinion upon the queſtion, whether a ſurgeon and apothecary ſhould be conſidered as an inferior tradeſmen.

So, by the ſtat. 8 & 9 *W.* 3. *c.* 11. *ſ.* 4. for the prevention of wilful and malicious treſpaſſes, it is enacted, "That "in all actions of treſpaſs, to be commenced or proſecuted "in any of his Majeſty's courts of record at *Weſtminſter*, "wherein at the trial of the cauſe it ſhall appear, and be "certified by the Judge under his hand, upon the back of "the record, that the treſpaſs, upon which any defendant "ſhall be found guilty, was wilful and malicious, the "plaintiff ſhall recover not only his damages, but his full "coſts of ſuit; any former law to the contrary notwith-"ſtanding." The certificate, required by this ſtatute, need *Ibid.* 655.
not be granted at the trial of the cauſe; and it is ſaid, that the ſtatute extends to every treſpaſs, that is not accidental as well as trifling; caſes are however to the contrary.

Where the declaration conſiſts of ſeveral counts, the *Ibid.*
plaintiff in the Court of K. B. is only entitled to the coſts of ſuch as are found for him; and neither party is allowed the coſts of thoſe which are found for the defendant. Where the plaintiff's declaration conſiſted of two counts, to one of which the defendant pleaded the general iſſue, which was found for the plaintiff, and to the other a juſtification, to which the plaintiff demurred, and judgment

was thereupon given for the defendant; the Court agreed that the defendant could have no coſts upon the demurrer. —But if there be two diſtinct cauſes of action, in two ſeparate counts, and as to one the defendant ſuffers judgment to go by default, and as to the other takes iſſue, and obtains a verdict, he is entitled to judgment for his coſts on the latter count, notwithſtanding the plaintiff is entiuled to judgment and coſts on the firſt count.

Of Treſpaſs on the Caſe.

For injuries to his poſſeſſion, an action on the caſe will alſo lie in moſt caſes where treſpaſs would be maintainable, and in others where it would not.

Bull. N. P. 74. 2 Ld. Raym. 1402. An action on the caſe lies for conſequential damages where the act itſelf is not an injury. It is now indeed a ſettled diſtinction, that where the immediate act itſelf occaſions a prejudice, or is an injury to the plaintiff's perſon, houſe, land, *&c.* treſpaſs *vi et armis* will lie; but where the act itſelf is not an injury, but a conſequence from that act is prejudicial to the plaintiff's perſon, houſe, land, *&c.* treſpaſs *vi et armis* will not lie, but the proper remedy is an action on the caſe. The difference, therefore, between treſpaſs and caſe is, that in treſpaſs the plaintiff complains of an immediate wrong, and in caſe, of a wrong that is the conſequence of another act.

1 Str. 635.

2 Ld. Raym. 1399. Fixing a ſpout, therefore, ſo as to diſcharge water upon the land of another, is only conſequentially injurious, and the party who ſuſtains the damage muſt bring caſe in order to get a compenſation.

Bull. N. P. 74. So, if a man who ought to encloſe againſt my land, do not encloſe, whereby the cattle of his tenants enter into my land, and do damage to me, I may have this remedy.

6 Mod. 312. In an action on the caſe by a leſſee for years againſt the owner of the adjoining houſe, for not repairing a party-wall, by which the plaintiff's houſe was damaged, it is not neceſſary to ſtate that he was bound by preſcription to repair the wall; it is ſufficient to declare that he was poſſeſſed of a meſſuage for a certain number of years, and that the defendant ought to repair the wall.

Note.

Note. If the owner of a houſe is bound to repair it, he and not the occupier is liable to an action on the caſe for an injury ſuſtained by a ſtranger from the want of repair. 2 H. Bl. R. 349. 12 Mod. 168. 3 T. R. 766.

But an action on the caſe for not repairing fences, whereby another party is damnified, can only be maintained againſt the occupier, and not againſt the owner of the fee, who is not in poſſeſſion. 4 T. R. 318.

In an action for ſtopping the plaintiff's lights, it is ſufficient to declare that he was poſſeſſed of ſuch a meſſuage for years and had and ought to have ſuch lights, without ſtating that the meſſuage and lights were antient. 6 Mod. 116.

It lies for damage done to the plaintiff's colliery, by what the defendant has done in his own colliery, within his own ſoil, though ſeveral other colleries lie between them; and treſpaſs *vi et armis* does not lie, for the damage is not immediate, but conſequential. *Com. Dig. tit. Action on the Caſe (A.)*

Caſe does not lie for a mere treſpaſs; as, for pulling down a wall, and taking off the tiles from a houſe; unleſs it be alledged, that the timber was thereby rotted. *Ibid.* (B. 6.)

Caſe lies for breaking the fences of a third perſon, whereby my cattle eſcape into his land and are diſtrained. 1 Ld. Raym. 273.

A poſſeſſory right is ſufficient to maintain an action of treſpaſs or caſe, though not a replevin. But treſpaſs and caſe cannot be joined, for the judgments differ; that in treſpaſs being a *capiatur*; and that in caſe, though *vi et armis*, a *miſcecordia*. 10 Mod. 25. 1 Ld. Raym. 272. 12 Mod. 233.

As this action ariſes from the ſpecial damage, any thing may be given in evidence on the general iſſue that deſtroys the right of action. Bull. N. P. 78.

A declaration for ſtopping up a watercourſe, without ſhewing how, is bad upon demurrer: but unobjectionable after verdict. 1 Ld. Raym. 452.

Caſe lies againſt the proprietor of tithes for not taking them away: but treſpaſs *vi et armis* will not; becauſe it is only a non-feaſance and not a mal-feaſance. The declaration may ſtate that the plaintiff ſet out the tithes, and the defendant refuſed to take them away: or the plaintiff may declare with a *per quod* the graſs did not grow where the tithes lay, and he could not put his cattle into the cloſe to depaſture the reſidue of the graſs, leſt they ſhould hurt the 3 Bur. 1891. 2 Ld. Raym. 187, 9.

the tithes; for though the proprietor of tithes does not remove them in convenient time, the owner of the land cannot put in his cattle and eat them, for to permit him, if the corn be not removed at the day, to put in his cattle and eat all the corn, would be a much greater loſs to the parſon than that which the plaintiff hath ſuſtained by the continuance of the corn upon the land, beſides that it is much more reaſonable to permit the plaintiff to bring an action againſt the parſon, and ſo the Court to be the judge of the reaſonableneſs of the time, and that the recompence be proportionable to the loſs ſuſtained.—In ſuch a caſe, the owner's remedy is either by diſtreſs or action.

8 T. R. 72.

Caſe will not lie againſt a parſon for not taking away his tithe, unleſs they have been properly ſet out: it is, therefore, not maintainable for not taking away tithe of hay where it was not ſet out in ſwathe.

3 Eſp. R. 31.

For other points reſpecting this action, we refer our readers to p. 444.

CHAPTER

CHAPTER XXII.

Of the Poors-Rate.

THE foundation of the Poor Laws was laid by the ſtat. 43 *Eliz. c.* 2. which was paſſed for the beſt of purpoſes, namely, to compel the idle to be induſtrious, and to relieve the wants of the unfortunate, and afford them thoſe comforts which they are diſabled to procure from infirmity or age; though from neglect and abuſe, its proviſions, and thoſe of many other Acts paſſed for the ſame purpoſe, are in a great meaſure fruſtrated. By Sect. 1. of the ſtat. of *Eliz.* it is enacted, "That the churchwardens of "every pariſh, and four, three, or two ſubſtantial houſe-"holders there, as ſhall be thought meet, having reſpect "to the proportion and greatneſs of the ſame pariſh and "pariſhes, to be nominated yearly in *Eaſter* week, or within "one month after *Eaſter*, under the hand and ſeal of two "or more Juſtices of the Peace in the ſame county, whereof "one to be of the *Quorum*, dwelling in or near the ſame "pariſh or diviſion where the ſame pariſh doth lie, ſhall "be called Overſeers of the Poor of the ſame pariſh: And "they, or the greater part of them, ſhall take order from "time to time, by and with the conſent of two or more "ſuch Juſtices of the Peace as is aforeſaid, for ſetting to "work the children of all ſuch whoſe parents ſhall not, by "the ſaid churchwardens and overſeers, or the greater "part of them, be thought able to keep and maintain them, "and uſe no ordinary and daily trade of life to get their "living by: And alſo to raiſe weekly or otherwiſe (*by "taxation of every inhabitant*, parſon, vicar, and other, "and *of every occupier* of lands, houſes, tithes impropriate, "propriations of tithes, coal-mines, or ſaleable under-"woods, in the ſaid pariſh, in ſuch competent ſum and "ſums of money as they ſhall think fit) a convenient ſtock

"of

" of flax, hemp, wool, thread, iron, and other neceſſary " ware and ſtuff, to ſet the poor on work: And alſo com- " petent ſums of money for and towards the neceſſary re- " lief of the lame, impotent, old, blind, and ſuch other " among them, being poor, and not able to work, and alſo " for the putting out ſuch children to be apprentices, to be " gathered out of the ſame pariſh, according to the ability " of the ſame pariſh, and to do and execute all other things " as well for the diſpoſing of the ſaid ſtock, as otherwiſe " concerning the premiſſes, as to them ſhall ſeem conve- " nient."

Sect. 4. " It ſhall be lawful, as well for the preſent as " ſubſequent churchwardens and overſeers, or any of them, " by warrant from any two ſuch Juſtices of Peace as is " aforeſaid, to levy as well the ſaid ſums of money and all " arrearages, of every one that ſhall refuſe to contribute " according as they ſhall be aſſeſſed, by diſtreſs and ſale of " the offender's goods, as the ſums of money or ſtock which " ſhall be behind upon any account to be made as afore- " ſaid, rendering to the parties the overplus; and in defect " of ſuch diſtreſs, it ſhall be lawful for any two ſuch Juſ- " tices of the Peace to commit him or them to the common " goal of the county, there to remain without bail or main- " priſe, until payment of the ſaid ſum, arrearages, and " ſtock: And the ſaid Juſtices of the Peace, or any of " them, to ſend to the houſe of correction or common " goal ſuch as ſhall not employ themſelves to work, being " appointed thereunto as aforeſaid; and alſo any ſuch two " Juſtices of Peace to commit to the ſaid priſon every one " of the ſaid churchwardens and overſeers who ſhall refuſe " to account, there to remain without bail or mainpriſe, " until he have made a true account, and ſatisfied and paid " ſo much as upon the ſaid account ſhall be remaining in " his hands."

Sect. 19. enacts " That if any action of treſpaſs or other " ſuit ſhall happen to be attempted and brought againſt any " perſon or perſons, for taking of any diſtreſs, making of " any ſale, or any other thing doing, by authority of this " preſent Act, the defendant or defendants, in any ſuch " action or ſuit, ſhall and may either plead not guilty, or " otherwiſe

" otherwiſe make avowry, cogniſance, or juſtification for " the taking of the ſaid diſtreſſes, making of ſale, or other " thing doing by virtue of this Act, alledging in ſuch " avowry, *&c.* that the ſaid diſtreſs, ſale, treſpaſs, or other " thing, whereof the plaintiff or plaintiffs complained, was " done by authority of this Act, and according to the " tenor, purport, and effect of this Act, without any ex- " preſſing or rehearſal of any other matter or circumſtance " contained in this preſent Act: to which avowry, cogni- " ſance, or juſtification, the plaintiff ſhall be admitted to " reply, That the defendant did take the ſaid diſtreſs, made " the ſaid ſale, or did any other act or treſpaſs ſuppoſed in " his declaration, of his own wrong, without any ſuch " cauſe alledged by the ſaid defendant: whereupon the iſſue " in every ſuch action ſhall be joined, to be tried by ver- " dict of twelve men, and not otherwiſe, as is accuſtomed in " other perſonal actions: And upon the trial of that iſſue " the whole matter to be given on both parties in evidence, " according to the very truth of the ſame, and after ſuch " iſſue tried for the defendant, or nonſuit of the plaintiff " after appearance, the ſame defendant to recover treble " damages, by reaſon his wrongful vexation in that behalf, " with his coſts alſo in that part ſuſtained, and that to be " aſſeſſed by the ſame jury, or writ to enquire of the da- " mages, as the ſame ſhall require."

Overſeers may be appointed at any time of the year. 2 Str. 1183.

The ſtatute extends to extra parochial places. 8 Mod. 39.

The occupier of land is rateable to the poor, and it is immaterial by what tenure he holds it, or whether he has any title, or not: for if a diſſeiſor obtain poſſeſſion of land, he is rateable as the occupier of it. 1 T. R. 341. 7 T. R. 590. 608.

The poors-rate is not a tax on the land, but a perſonal charge in reſpect of the land.—In general, the farmer or occupier, and not the landlord, is liable to this tax. Cowp. 452.

Every inhabitant ought to be rated according to the preſent value of his eſtate, whether it continue of the ſame value as when he purchaſed it, or be rendered more valuable by the improvements which he has made on it. If a perſon chooſe to keep his property in money, and the fact 6 T. R. 155.

of

of his poſſeſſing it be clearly proved, he is rateable for that: but if he prefer uſing it in the melioration of an eſtate or other property, he is rateable for the ſame in another ſhape. Suppoſe a perſon has a ſmall piece of land in the heart of a town, which is only of ſmall value, and he afterwards build on it, he muſt be rated to the poor according to its improved value with the building upon the land.—In ſhort, in whatever way the owner makes his eſtate more valuable, he is liable to contribute to the relief of the poor in proportion to that improved eſtate.

So, perſonal property, if viſible, and yielding a certain annual permanent profit, is rateable.

2 T. R. 727. The bare poſſeſſion of perſonal property is evidence from whence the Juſtices may draw the concluſion that the poſſeſſor ſhould be rated; and the circumſtance of a perſon's having been rated for his ſtock in trade one year is *primâ facie* evidence that it is productive the next year; and if not contradicted by other evidence, is ſufficient to warrant the Juſtices to decide that it ſhould be then rated.

5 T. R. 587. The Court is not precluded, by the Seſſions ſtating in the caſe "that the party rated is the occupier," from examining into the propriety of that concluſion, if the Seſſions alſo ſtate all the circumſtances of the caſe, and deſire to have the opinion of the ſuperior Court upon the whole.—

3 T. R. 497. Where, however, the Seſſions found that the maſter gunner at *Seaford* was the "occupier" of the battery-houſe there, which was the property of the Crown, and from whence he was removeable at pleaſure: it was held that the *fact* found, of his being "the occupier," precluded any other queſtion, and fixed his liability to be rated.

2 Ld Raym. 1281. 4 Bur. 2290. A farmer, it has been ſaid, is not rateable for his ſtock: *tamen quære.*

4 Bur. 2439. 2 Bur. 1053. 1063. 1 Bl. R. 250. *a.c.* The poors-rate muſt be charged upon the occupiers. In the caſe of *St. Luke's* Hoſpital, and of *Chelſea* Hoſpital, the officers were rateable as occupiers. The corporation of *London* are not *de facto* the occupiers of *St. Bartholomew's* Hoſpital; the poor are occupiers; but they are not rateable.—The general rule of law muſt be followed. That rule is, "That you muſt find an occupier to be rated."

The

The poor people cannot be rated at all: the ſervants cannot be rated as occupiers; nor can the corporation be charged as occupiers.

For property is not rateable to the poor, unleſs there be ſome perſon in the beneficial occupation of it. 4 T. R. 730.

Therefore, the truſtees of a Quakers meeting-houſe, of which no profit is made by the pews, *&c.* are not rateable. So, a perſon employed by the Philanthropic Society to ſuperintend the children at annual wages, under an agreement that he ſhall have "a dwelling-houſe free from taxes, *&c.*" with certain other perquiſites, and who may be diſmiſſed at a minute's warning on receiving three month's wages, is not rateable as the occupier of the houſe provided by the Society, ſhe having no diſtinct apartment in the houſe but a bed-chamber, and her family not being allowed to live there. 5 T. R. 79. *Ibid.* 587.

But the maſter of a free-ſchool, appointed by the miniſter and inhabitants of the pariſh under a charitable truſt, whereby a houſe, garden, *&c.* were aſſigned "for the habitation and uſe of the maſter and his family, freely without payment of any rent, income, gift, ſum of money, or other allowance, whatſoever," for teaching ten poor boys of the inhabitants, is rateable for his occupation of the ſame: for it is not like the caſe of an exemption by Act of Parliament, by which the legiſlature had a right to bind every perſon; for here the party was appointed by deed, and only thoſe who are parties to a deed are bound by it. 6 T. R. 333.

If the owner of a houſe occupy part of it, he is liable to be rated for the whole; unleſs there be a diſtinct occupation of the reſt by ſome other perſon. 4 T. R. 477.

A houſe and engine for carding cotton, which are rented as one entire ſubject, and deſcribed by the general name of "an engine-houſe," may be rated. So may the profits of a weighing-machine-houſe. 1 T. R. 727.

A perſon entitled to toll tin and farm dues (which are certain portions of the tin raiſed by the adventurers in the tin-mines) is liable to be rated in reſpect thereof. 3 T. R. 480.

Lead-mines, it has been held, are not rateable to the poor. But a leſſee (under the Crown) of lead-mines, is rateable for the profits ariſing from lot and cope, which are duties 1 Bl. R. 389. Cowp. 451.

duties paid him by the adventurers, without riſk on his part.

5 T. R. 596. The leſſee of a coal-mine has even been held to be rateable, though he derived no property from the mine; the mine being rateable property. If the property be rateable, and the party rated be in the occupation of it, the Court cannot examine any farther and enquire whether or not the tenant has made an unprofitable bargain. Suppoſe a landlord makes ſo hard a bargain with his tenant, that the latter derives no benefit from the farm, muſt not the tenant be rated to the poor? The landlord certainly is not liable.

7 T. R. 598. Where *A.* having granted to *B.* a leaſe for years of way-leaves (for the purpoſe of carrying coals,) and the liberty of erecting bridges, and levelling hills over certain lands, *B.* made the waggon-ways, incloſed them, thereby excluding all other perſons, erected bridges, and built two houſes on the land for his ſervants; *B.* was held to be liable to be rated to the poor for "the ground called the waggon-way."

2 T. R. 94. But a mere eaſement is not rateable. Therefore, a party who has an excluſive right to uſe a way-leave, paying ſo much *per* ton for the goods carried over it, is not liable. *Quære*, Whether the owner of the land who receives a profit for ſuch way-leave, is not liable to be rated for ſuch an increaſe of value: for it is not a grant of the profits of the land.

3 T. R. 386. The proprietors of tithes are liable to be rated; therefore fiſh being tithable by cuſtom, ſuch tithe is rateable: for the legiſlature intended that, when rates are made for the relief of the poor, every perſon ſhould contribute according to the benefit which he receives within the pariſh. Here the parties receive a certain benefit ariſing from the tithe of fiſh in this pariſh, and run no riſk whatever. To ſay that only property which is viſible ſhould be rated, is carrying the rule of exemption too far; for oblations and other offerings, which conſtitute the rectorial or vicarial dues, are

8 Mod. 62. rateable.—If a rector make a verbal leaſe of his tithes for a year, and the leſſee let the tithes to the reſpective landholders for ſixpence *per* acre more than he is to pay the rector, the leſſee is the occupier of the tithes, he having them in ſuch a manner as to make a profit of them.

A ſum

A ſum of money made payable by the owners of lands in lieu of tithes by Act of Parliament, with a clauſe of diſtreſs annexed, is liable to the poors-rate: for it is a mere compoſition for tithes, which were before ſubject to the poors-rate; and the ſuperadding a power of diſtreſs does not turn it into a rent, but rather proves the contrary, for if it were a rent, the diſtreſs would be incident to it, without any ſpecial proviſion in the Act. 2 Bl. R. 1252.

Stock in trade, like other perſonal property, is rateable when its value can be aſcertained. 4 T. R. 771. 6 T. R. 154. 468.

A veſſel may be rated as perſonal property *com. ſemb.* but not *eo nomine* as a veſſel. Ships are rateable in the pariſh to which they belong. 7 T. R. 275.

But houſehold furniture is not. Neither is money, whether at intereſt or not. Nor the pay of officers of the royal navy, or of merchants ſhips. Nor the ſalaries of officers of the cuſtoms, or of merchants clerks. Nor any attorney in reſpect of the profits of his profeſſion. 4 T. R. 772.

No perſonal property can be rated, but the clear liquidated ſurplus, after paying all his debts. 1 Bl. R. 667. 4 T. R. 777.

Quit-rents, therefore, and other caſual profits of a manor, are not rateable. 1 Bl. R. 212.

The poſſeſſions of the Crown or of the Public are not rateable. 2 T. R. 375.

Therefore, ſtables rented by the Colonel of a regiment, by order of the Crown, for the uſe of the regiment, are not liable to be rated. *Ibid.*

But perſons holding houſes or lands under the Crown, or under any hoſpital, if for their own ſeparate benefit, are liable to be rated. 3 T. R. 497.

The ranger of a royal park, therefore, is rateable, as for incloſed lands in the park yielding certain profits.—But he is not rateable for the herbage and pannage, which yield no profits. 1 T. R. 338. 2 H. Bl. R. 265.

Tolls directed by Act of Parliament to be applied to public purpoſes, were held not to be rateable, 4 T. R. 730.

But lands purchaſed by a company, and converted into a dock, according to Act of Parliament, which declares that the ſhares of the proprietors ſhall be conſidered as perſonal property, are rateable in proportion to the annual profits. 1 T. R. 219.

3 T. R. 602. An exemption in a private ſtatute in 12 *Car.* 2. of lands given to charitable uſes "from all public taxes, charges, "and aſſeſſments whatſoever, civil or military," extends to the poors-rate.

Cowp. 619. If *A.* rent a quantity of land together with a mineral ſpring ariſing therefrom, at a groſs yearly rent, he is rateable to the poor for the whole of ſuch rent, though the annual value of the mere land is only in proportion of 2 to 8 of the reſerved rent.

2 Com. R. 534. Whether or not chambers in an Inn of Court are rateable is undetermined: the fact of their being extra-parochial does not ſeem to be a ſufficient ground of exemption; for if it were, the poor of extra-parochial places would be deprived of the benefit of the ſtatute of *Elizabeth*, which has been conſtrued to extend to them.

How raiſed, and where collected. A rate being made by the churchwardens and overſeers, it is proclaimed in the church, when it becomes formal and public. If any one feel aggrieved by the making of the rate (he need not be damnified by the rate,) he muſt appeal to the next ſeſſions; and if any point of law ariſe on hearing the appeal, it may be removed into the Court of King's Bench, by *certiorari*, in order to be determined.

The ſtat. 17 *G.* 2. *c.* 3. *ſ.* 1. after reciting that, "Whereas "great inconveniencies do often ariſe in cities, towns cor"porate, pariſhes, townſhips, and places, by reaſon of the "unlimited power of the churchwardens and overſeers of "the poor, who frequently on frivolous pretences, and "for private ends, make unjuſt and illegal rates in a ſecret "and clandeſtine manner, contrary to the true intent and "meaning of a ſtatute made in the forty and third year of "the reign of Queen *Elizabeth*, intituled, "An Act for "the Relief of the Poor;" enacts, "That the church"wardens and overſeers, or other perſons authorized to "take care of the poor in every pariſh, townſhip, or place, "ſhall give or cauſe to be given public notice in the "church, of every rate for the relief of the poor, allowed "by the Juſtices of the peace, the next Sunday after the "ſame ſhall have been ſo allowed; and that no rate ſhall "be eſteemed or reputed valid or ſufficient, ſo as to collect

"and

" and raiſe the ſame, unleſs ſuch notice ſhall have been " given."

If a poor rate be not publiſhed in the church on the *Sunday next* after it is allowed, it is a nullity; and payment under it cannot be enforced, though there be no appeal to the Seſſions. Suppoſing the pariſh officers were to give notice of the rate at ſome other public place in the pariſh, it would not be ſufficient, though it might be equally meritorious. The omiſſion is a radical defect in the rate itſelf which nothing can cure. 4 T. R. 369.

But it is not neceſſary to ſtate in a reſerved caſe, that the rate was regularly publiſhed in the church, if that queſtion was not intended to be referred. 2 T. R. 664.

If, however, the queſtion were, whether an action of treſpaſs could be ſupported by a perſon whoſe goods were diſtrained for non-payment of the rate, there is no doubt but that the publication of the rate under the ſtat. 17 *G.* 2. *c.* 3. muſt be proved. *Ibid.*

The ſuperior Court cannot enter into the inequality of the rate; unleſs it appear to them to be ſelf-evidently, neceſſarily, and unavoidably unequal: they cannot preſume it to be ſo. The Juſtices at the Seſſions are the proper judges reſpecting the equality or inequality of the rate. The diſtinction between orders of Juſtices, and ſpecial verdicts has been long eſtabliſhed: in the latter, where it concludes generally, the whole caſe muſt appear upon record; but the very reverſe is the rule which obtains in the caſe of orders of Juſtices, for the Court will intend every thing to be right which does not appear to be otherwiſe, and they will not entertain any doubt upon a ſubject upon which the Juſtices did not. A poors-rate is not to be removed. 4 Bur. 2493, 4. 6 T. R. 665, 6. 2 Str. 932, 975.

On encloſure of a waſte in the pariſh of *A.* on which the land-owners of *B.* had a right of common appurtenant, the allotments given in lieu of that right ſhall be aſſeſſed to the poor in the pariſh of *A.* 2 Bl. R. 1144.

Where a ſtatute ſays that a company ſhall not be liable to any rates which had not *uſually* been aſſeſſed, it only means, that they ſhall not have any other *kind* of rate im- 6 T. R. 660.

poſed on them than thoſe which were then levied, but does not fix the proportion of the rate.

Ibid. A perſon ſhall be rated for profits where they become due, not where they happen to be received.

Ibid. Where a navigation ran from *A.* to *B.* through ſeveral intervening pariſhes, and the tolls for the whole navigation were collected in thoſe two pariſhes, it was holden, that they might be aſſeſſed in the two pariſhes for the whole amount according to the proportion collected in each.

4 T. R. 21. A barge-way and toll-gate in the hamlet of *Hamptonwick*, purchaſed by the city of *London*, by virtue of ſtat. 17 *G.* 3. *c.* 18. (for completing the navigation of the *Thames*, and empowering the city to levy tolls and duties towards the charges of the navigation,) was held to be rateable for ſuch tolls as became due there, notwithſtanding the tolls were collected in a different pariſh.

Cowp. 581. The grantee of the navigation of the river *Ouſe*, is rateable to the poor of *Cardington* in reſpect to the tolls ariſing there, though he himſelf reſides, and the tolls are collected elſewhere.

8 T. R. 340. So, where a Navigation Act empowered the proprietors to take ſo much *per* mile *per* ton for all goods carried along the canal, it was holden, that they were rateable to the poor for the tolls in the different pariſhes where the tolls became due, that is, where the reſpective voyages finiſhed, though for their own convenience they were authorized to *collect* the tolls where they pleaſed, and did in fact collect them in other pariſhes.

4 T. R. 543. So, where by a Navigation Act the proprietor was entitled to a toll of 4*s per* ton for goods carried from *A.* to *B.* or from *B.* to *A.* and to a proportionable ſum for any leſs diſtance, and was alſo enabled to appoint any place of collection; it was holden that the tolls for goods carried the whole voyage from *A.* to *B.* were rateable in *B.* though in fact they are collected in a pariſh between *A.* and *B.* becauſe the tolls become due where the voyage is completed.

Ibid. 778. County Juſtices cannot rate a pariſh within their juriſdiction, *in aid* of another pariſh, lying within a borough which

which has an exclusive jurisdiction, though within the same hundred and county.

Linen works are rateable in the hands of the occupier, though there be risk and expence in the working, and the profits be uncertain. 1 East's R. 534.

The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the constitution, and liable to be discharged for any breach of such rules, are rateable in respect of such occupation. *Ibid.* 584.

By stat. 17 *G.* 2. *c.* 38. *s.* 12. it is enacted, "That where "any person or persons shall come into or occupy any house, "land, tenement, or hereditament, or other premisses, out "of, or from which any other person assessed shall be re- "moved, or which at the time of making such rate was "empty or unoccupied, that then every person so removing "from, and every person so coming into, or occupying the "same, shall be liable to pay such rate in proportion to the "time that such person occupied the same, respectively in "the same manner, and under the like penalty of distress, "as if such person so removing had not removed, or such "person so coming in or occupying had been originally "rated and assessed in such rate; which said proportions, "in case of dispute, shall be ascertained by two Justices of "the peace."

Distress for Poors-Rate.

By stat. 28 *G.* 2. *c.* 17. *s.* 7. "for the more effectual "levying money assessed for the relief of the poor, it is "enacted, That the goods of any person assessed and refusing "to pay, may be levied by warrant of distress, not only in "the place for which such assessment was made, but in any "other place within the same county or precinct; and if "sufficient distress cannot be found within the said county "or precinct on oath made thereof before some Justice of any "other county or precinct, (which oath shall be certified "under the hand of such Justice on the said warrant,) such "goods may be levied in such other county or precinct by "virtue of such warrant and certificate; and if any person "shall find him or herself aggrieved by such distress as "aforesaid, it shall and may be lawful for such person to "appeal to the next General or Quarter Sessions of the

" Peace for the county or precinct where such aſſeſſment " was made; and the Juſtices there are hereby required " to hear and fully determine the ſame."

Sect. 8. " And to prevent all vexatious actions againſt " overſeers of the poor, be it enacted, That where any diſ- " treſs ſhall be made for any ſum or ſums of money juſtly " due for the relief of the poor, the diſtreſs itſelf ſhall not " be deemed to be unlawful, nor the party or parties mak- " ing it be deemed a treſpaſſer or treſpaſſers, on account of " any defect, or want of form in the warrant for the ap- " pointment of ſuch overſeers, or in the rate or aſſeſſment, " or in the warrant of diſtreſs thereupon; nor ſhall the " party or parties diſtraining be deemed a treſpaſſer or " treſpaſſers *ab initio*, on account of any irregularity, " which ſhall be afterwards done by the party or parties " diſtraining, but the party or parties aggrieved by ſuch " irregularity, ſhall or may recover full ſatisfaction for the " ſpecial damage, he, ſhe, or they ſhall have ſuſtained " thereby, and no more, in an action of treſpaſs, or on " the caſe, at the election of the plaintiff or plaintiffs."

Bull. N. P. 82. *Note.* A warrant may be made to diſtrain before the time for which the rate is made is expired.

2 Ld. Raym. 735, 545. A conſtable may levy a poors-rate on goods in another pariſh, for though he cannot execute out of his own diſtrict a warrant directed generally to all conſtables, yet he may execute any where within the limits of the Juſtice's juriſdiction, a warrant directed particularly to him.

2 Bl. R 1370. A diſtreſs for a poors-rate for lands not in the occupation of the plaintiff may be replevied notwithſtanding the Seſſions on appeal had confirmed the rate: the determining that a man may be aſſeſſed for what he does not occupy being an exceſs of juriſdiction.

7 T. R. 270. The granting of a warrant of diſtreſs by magiſtrates to enforce payment of a poors-rate is a judicial, not a miniſterial act. Before a diſtreſs for the rate be levied, a ſummons ſhould go to the party, that he may have an opportunity to ſhew that he has paid it, or otherwiſe to exonerate himſelf.

4 T. R. 777 If perſonal property be rateable, it is not to be done at random, and to leave the party rated to get off as he can; but

but the officer making the rate muſt be able to ſupport what he has done by evidence.

Where a perſon is overcharged in a poors-rate, the Seſſions may relieve him on appeal, and amend the rate, by leſſening the ſum aſſeſſed on him, under the 17 *G.* 2. *c.* 38. a T. R. 623.

The ſtat. 21 *J.* 1. *c.* 12. enacts, "That Juſtices of the peace, "mayors, bailiffs, church-wardens, and overſeers of the poor, "conſtables, and other peace-officers, may plead the general "iſſue, and give the ſpecial matter in evidence. It alſo "enacts, That any action brought againſt them ſhall be laid "in the proper county; and if upon the general iſſue pleaded, "the fact ſhall appear to be done in another county, the jury "ſhall find the defendant guilty."

By ſtat. 7 *J.* 1. *c.* 5. "If caſe, treſpaſs, battery, or falſe "impriſonment ſhall be brought againſt any Juſtice of "the peace, mayor, bailiff, conſtable, &c. concerning any "thing by them done by virtue of their office, they may "plead the general iſſue, &c. and if the verdict ſhall paſs "with the defendant, or the plaintiff ſhall be non-ſuited, or "ſuffer any diſcontinuance thereof, the defendant ſhall have "his double coſts allowed by the Judge before whom the "matter is tried.

This Act has been conſtrued to extend to under-ſheriffs and deputy-conſtables, though they are not particularly mentioned. Bull, N. P. 332.

Note. The 21 *J.* 1. *c.* 22. extends this Act to church-wardens and overſeers of the poor. *Ibid.*

The officers muſt get a certificate from the Judge, that the action was brought againſt him for ſomething done in the execution of his office, in order to enable himſelf to double coſts. *Ibid.*

Likewiſe the ſtat. 24 *G.* 2. *c.* 44. enacts, "That no writ "ſhall be ſued out againſt a Juſtice for what he ſhall do in the "execution of his office, till notice in writing of ſuch in-"tended writ ſhall have been delivered to him, or left at the "uſual place of his abode, a month before, and the Juſtice "may tender amends, and in caſe the ſame is not accepted, "plead ſuch tender in bar to the action, together with the "plea of not guilty, and any other plea with leave of the "Court; and if upon iſſue joined thereon the jury ſhall

" find the amends ſo tendered to have been ſufficient; then " they ſhall give a verdict for the defendant." It likewiſe enacts, " That no action ſhall be brought againſt any con- " ſtable or other officer, or any other perſon acting by his " order, for any thing done in obedience to a Juſtice's war- " rant, until demand made of the peruſal and copy of ſuch " warrant, and the ſame has been refuſed for the ſpace of " ſix days; and in caſe the warrant be ſhewed and a copy " taken, and afterwards an action be brought againſt the " conſtable, with making the Juſtice a defendant, the jury " ſhall, on producing the warrant, find a verdict for the de- " fendant, notwithſtanding any defect of juriſdiction in the " Juſtice; and if ſuch action be brought jointly againſt the " Juſtice and him, upon producing the warrant, the jury " ſhall find for him; and if they find againſt the Juſtice, the " plaintiff ſhall recover the coſts he is to pay to ſuch defend- " ant againſt the Juſtice, with a proviſo, that if the Judge cer- " tify that the injury was wilfully and maliciouſly com- " mitted, the plaintiff ſhall be entitled to double coſts: and " a proviſo likewiſe, that ſuch action ſhall be commenced " within ſix calendar months after the act committed."

The above Act extends only to actions of tort.

9 Bur. 1766. The officer muſt prove that he acted in obedience to the warrant, and where the Juſtice cannot be liable, the officer is not within the protection of the act.

Bull. N. P. 24. If a man be impriſoned on a Juſtice's warrant on the firſt day of *January*, and kept in priſon till the firſt day of *February*, he will be in time if he brings his action within ſix months after the firſt of *February*; for the whole impriſonment is one entire treſpaſs. The Juſtice having pleaded tender of amends, the plaintiff obtained a rule for the defendant to bring the money into Court for the plaintiff to take the ſame, upon diſcontinuing his action.

Ibid. An overſeer of the poor who diſtrains for a poor's-rate under a Juſtice's warrant, is an officer with the protection of the Act.

2 Bur. 1157. No action of debt will lie for a poors-rate.

Ibid. 1 Bl. R. 284. *s. c.* Whether the repreſentative of a party aſſeſſed to the poors-rate be liable to a diſtreſs for the rate, ſeems doubtful, though the rate, being in reſpect of the occupation, the

the weight of argument ſeems to be in favour of his liability, notwithſtanding the party who has made himſelf liable to a diſtreſs is termed an "offender;" for a bankrupt, though in early ſtatutes he was conſidered as a criminal, has long ſince ceaſed to be ſo regarded. It ſeems clear that the repreſentative ought to have a notice before his teſtator's goods be diſtrained upon; in order that he may have the ſame means of exonerating them, as his teſtator would have had.

An individual may be ſubject to the repair of the aiſle, or any other part of a church by preſcription; ſo *com. ſemb.* of the whole church, ſo that the pariſhioners may not be rateable, and ſo of a corporation. If therefore certain funds, veſted in a corporation who have always been accuſtomed to the repair of the church, prove inadequate to that purpoſe, the inhabitants are not *com. ſemb.* liable to a rate, but the funds muſt be applied as far as they will go, and the aid of Parliament be reſorted to for relief in reſpect to the ſum wanted; in which caſe Parliament would probably create a rate on the pariſhioners, if any, and if there were none, would grant a certain ſum. MSS. Eaſt. T. 40 G. 3. Cro. Eliz. 659.

An individual may have a preſcriptive right to a ſeat, &c. in a church which might be in reſpect to his houſe, and its inhabitants, even though it be ſituated in another pariſh; and not in reſpect to his lands, and the ſheep and horſes thereon: but the right to repair a part or the whole of the church may well be in reſpect of lands. Cro. Jac. 366.

Of common right, that is, by the antient canon and civil law, the parſon ought to have repaired the whole church; and it is by the cuſtom of England only that the pariſh repairs the body. 12 Mod. 83.

ADDENDA.

ADDENDA.

THE ſurrender by an infant leſſee deed is void; but a ſurrender in law by the acceptance of a new leaſe is good, if ſuch new leaſe increaſe his term or decreaſe his rent. *Infant.* Cro. Car. 501.

A diſtreſs taken for rent, accrued after the expiration of the notice to quit, is a waiver of that notice; for though in the mere acceptance of rent, the *quo animo* is to be left to the jury, (for the acceptance of money is equivocal, it may be in ſatisfaction for a treſpaſs, or it may be for rent,) yet a diſtreſs is an act not to be qualified, and amounts to a confirmation of the tenancy. *Notice to quit* 1 H. Bl. R. 311.

The three month's notice required by ſect. 38 of ſtat. 14 *G.* 3. *c.* 78. is only neceſſary where the perſon, who at the time when it is neceſſary to build, &c., is liable to pay, cannot agree with the owner of the adjoining houſe. *Party Walls.* 5 T. R. 130.

To treſpaſs for breaking and entering, &c. and pulling down and taking away certain buildings, &c. the defendant, as to the breaking and entering, ſuffered judgment by default, and pleaded not guilty as to the reſt. It was held, that ſuch plea was ſuſtained by ſhewing that the building taken away, which was of wood, was erected by him as tenant of the premiſſes on a foundation of brick for the purpoſe of carrying on his trade, and that he ſtill continued in poſſeſſion of the premiſſes at the time when, &c. though the term was then expired. Lord *Kenyon*, C. J. obſerved, That the old caſes upon this ſubject leant to conſider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way in favour of the tenant, in ſupport of the *Fixtures.* 1 Eaſt's R. 88.

the intereſts of trade, which is become the pillar of the ſtate. What tenant will lay out his money in coſtly improvement of the land, if he muſt leave every thing behind him which can be ſaid to be annexed to it? Shall it be ſaid, that the great gardeners and nurſerymen in the neighbourhood of this metropolis, who expend thouſands of pounds in the erection of green-houſes and hot-houſes, &c. are obliged to leave all theſe things upon the premiſſes, when it is notorious that they are even permitted to remove trees, or ſuch as are likely to become ſuch, by the thouſand, in the neceſſary courſe of their trade? If it were otherwiſe, the very object of their holding would be defeated. This is a deſcription of property divided from the realty; and ſome of the caſes have even gone further in favour of the executor of tenant for life againſt the remainder-man, between whom the rule has been holden ſtricter; for it has been determined that the executor of tenant for life was entitled to take away the fire-engine of a colliery. The caſe of *Fitzherbert* v. *Shaw* (1 *H. Bl. R.* 258. *vide ante*, p. 206.) turned upon the conſtruction of an agreement that ſuch things ſhould be left on the premiſſes, and decided nothing againſt the general principle. Here the defendant did no more than he had a right to do: he was in fact ſtill in poſſeſſion of the premiſſes at the time the things were taken away, and therefore there is no pretence to ſay that he had abandoned them.

Holding over. 5 Mod. 384. Leſſee holding over is not a treſpaſſer till entry. See 4 *G.* 2. *c.* 28. *ante* p. 329.

Partition. In caſe partition be made, returned, and filed, the tenants before diviſion are to remain tenants, under the ſame conditions, and the landlords, &c. are to make good to their tenants the ſaid parts as before partition made. Stat. 8. & 9. *W.* 3. *c.* 31. *ſ.* 4.

12 Mod. 202. In caſe of partition, if rent be aſſigned for owelty, [equality] of partition, if there be three parceners and rent aſſigned to two, if it were a grant they would be joint-tenants, and the rent would ſurvive: whereas it being but an appointment, if either of them die, the rent ſhall go to the heir of the deceaſed, and not ſurvive.

APPENDIX.

APPENDIX.

PRECEDENTS OF AGREEMENTS, &c.

Agreement for a Houſe and Field, with a Covenant to grant a Leaſe at the end of the Term, if required.

MEMORANDUM of an agreement entered into this day of 1802, by and between *A. B.* of of the one part and *C. D.* of of the other part, whereby it is agreed, That the ſaid *A. B.* ſhall demiſe and lett to the ſaid *C. D.* and the ſaid *C. D.* ſhall take, hold, and enjoy a meſſuage or tenement, with the garden and appurtenances thereto belonging, ſituate, lying and being in in the pariſh of in the county of now or late in the occupation of together with all that field or cloſe, ſituate, lying and being in aforeſaid, called or known by the name of now or late in the occupation of together with all ways, paths, paſſages, watercourſes, eaſements and appurtenances whatſoever thereunto belonging, from the day of for and during the term of years, The ſaid *C. D.* yielding and paying the ſum of yearly, by four equal quarterly payments, on the reſpective days following, that is to ſay: the Annunciation of the bleſſed Virgin Mary, the nativity of St. John the Baptiſt, the feaſt of St. Michael the Archangel, and the birth of our Lord Chriſt, and alſo yielding and paying by the ſaid *C. D.* the ſaid yearly ſum or rent of for and during the time that the ſaid *C. D.* ſhall hold and enjoy the ſaid meſſuage or tenement and its appurtenances, and the ſaid field or cloſe and its appurtenances, after the expiration of the term for which they are reſpectively hereby demiſed by equal quarterly payments on the reſpective days and times aforeſaid: and it is further agreed, that the ſaid *A. B.* ſhall on or before the day of next, put in good and tenantable repair and condition, the ſaid meſſuage or tenement, with its appurtenances, and on or before the day aforeſaid, put the hedges or ditches of the ſaid field or cloſe in good order and condition. It is alſo agreed that the ſaid *C. D.* ſhall,

ſhall, for and during the time he ſhall hold, occupy, and enjoy the ſame, keep the ſaid meſſuage or tenement with its appurtenances in good and tenantable repair, reaſonable wear excepted, and preſerve the hedges and ditches of the ſaid field or cloſe in good ſtate, order and condition: And it is further agreed, that if the ſaid *C. D.* ſhall or do at any time or times hereafter, underlet or aſſign over all or any part of the ſaid meſſuage or tenement and its appurtenances, or all or any part of the ſaid field or cloſe and its appurtenances, to any perſon or perſons whatſoever, it ſhall and may be lawful to and for the ſaid *A. B.* either by himſelf or his agent immediately to re-enter and re-poſſeſs the ſaid meſſuage or tenement with its appurtenances, as if this agreement had never been made: And the ſaid *A. B.* hereby agrees that if the ſaid *C. D.* ſhall be minded or deſirous to take a leaſe of the ſaid meſſuage or tenement with its appurtenances and the ſaid field or cloſe with its appurtenances, after the expiration of the ſaid term of years, for the further term of years, at the yearly rent of payable quarterly as aforeſaid, the ſaid leaſe to contain the uſual covenants, he the ſaid *A. B.* will grant to the ſaid *C. D.* ſuch leaſe for ſuch further term, at ſuch rent and payable as aforeſaid; the coſts and charges of the ſaid leaſe to be equally defrayed and diſcharged by and between the ſaid parties, provided the ſaid *C. D.* gives the ſaid *A. B.* notice in writing of ſuch wiſh or deſire, within months before or prior to the expiration of the ſaid term of years, for which the ſaid premiſſes are hereby demiſed.

As witneſs, *&c.*

Agreement for Lodgings.

MEMORANDUM of an agreement entered into this day of 1802, by and between *E. F.* of *&c.* and *G. H.* of *&c.* whereby the ſaid *E. F.* agrees to let, and the ſaid *G. H.* agrees to take the rooms or apartments following: that is to ſay, an entire firſt floor, and one room in the attic ſtory or garrets, and a back kitchen and cellar oppoſite, with the uſe of the yard for drying linen, or beating carpets or clothes, being part of a houſe and premiſſes in which the ſaid *E. F.* now reſides, ſituate and being in To have and to hold the ſaid rooms or apartments, and the uſe of the ſaid yard as aforeſaid, for and during the term of half a year, to commence from next after the date hereof, at and for the yearly rent of pounds of lawful money of the United Kingdoms of Great Britain and Ireland, payable quarterly, by even and equal portions; the firſt quarterly payment to be made on next enſuing the date hereof: And it is further agreed that at the expiration of the ſaid term of half a year, the ſaid *G. H.* may hold, occupy, and enjoy the ſaid rooms or apartments, and have the uſe of the ſaid yard as aforeſaid, from quarter to quarter, for

for ſo long a time as the ſaid *G. H.* and *E. F.* may and ſhall agree, at the rent of for each quarter, and that each party be at liberty to quit poſſeſſion, on giving to the other a quarter's notice in writing or warning. And it is alſo further agreed between the ſaid parties, that when the ſaid *G. H.* ſhall quit the premiſſes, he ſhall leave them in as good condition and repair as they ſhall be in on his taking poſſeſſion thereof, reaſonable wear excepted.

As witneſs, *&c.*

An Agreement to let a ready furniſhed Lodging.

MEMORANDUM of an agreement entered into this day of in the year of our Lord by and between *J. K.* of *&c.* of the one part, and *L. M.* of *&c.* of the other part, by which the ſaid *J. K.* agrees to let to the ſaid *L. M.* a room or apartment up pair of ſtairs forwards in his the ſaid *J. K's.* houſe, ſituate in ſtreet, in the pariſh and county aforeſaid, ready furniſhed; together with the uſe and attendance of his ſervant, in common with other lodgers, at ſuch hours and times when he himſelf can ſpare And alſo the uſe of a cellar, at the rent of pounds of lawful money of the United Kingdoms of Great Britain and Ireland, *per* quarter, And the ſaid *L. M.* agrees to take the ſaid room or apartment, with the uſe of the ſervant and cellar as aforeſaid, at the rent aforeſaid, and alſo to find and provide for himſelf, all manner of linen and china or crockery ware whatſoever, that he ſhall have occaſion for, and that if he ſhall break or damage any part of the furniture of the ſaid *J. K.* he will make good or repair the ſame, or pay her ſufficient to enable her to put the ſame in the ſame plight and condition as they now are in. And it is further agreed, that if either party ſhall quit or leave the premiſſes, he or ſhe ſhall reſpectively give or take a quarter's notice or warning.

As witneſs, *&c.*

A Leaſe for Years of a Houſe and Lands in the Country, with an exception of Trees, and Special Covenants.

THIS INDENTURE made the day of in the year of our Lord and in the year of the reign of our Sovereign Lord George the Third, between *A. A.* of the one part, and *B. B.* of the other part, *witneſſeth*, that for, and in conſideration of the rents, covenants, proviſoes, and agreements hereinafter reſerved and contained, and which on the part and behalf of the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, are to be paid, done, and performed, he the ſaid *A. A.* *hath* demiſed, granted, and to farm letten, and by theſe preſents *doth* demiſe, grant, and to farm let unto the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, *all* that * The parties, The conſideration. The demiſe. The parcels.

* It is beſt to deſcribe the *parcels* as particularly as you can, *viz.* the *meſſuage, lands, cloſes*, &c. by their proper names, (if any) or by their ſeveral *abuttals* and *boundaries*, *&c.*

meſſuage,

meſſuage, tenement, or farm houſe, *late* in the poſſeſſion of *E. B.* and thoſe two cottages or tenements, now or late in the poſſeſſion of *F. F.* and *G. G.* or their aſſigns, with the appurtenances, ſituate, ſtanding and being in the pariſh of *C.* and *H.* or one of them, in the ſaid county of *D.* together with all and ſingular the yards, gardens, orchards, backſides, barns, ſtables, out-houſes, edifices and buildings thereunto belonging, and alſo all thoſe ſeveral cloſes, pieces, or parcels of arable land, meadow, paſture, wood, and wood ground, containing by eſtimation acres, (be they more or leſs,) lying and being in the ſeveral pariſhes, fields, precincts, and territories of *C.* and *H.* or one of them, in the ſaid county of *D.* to the ſaid meſſuage, tenement or farm houſe belonging, and therewith held, uſed, occupied, and enjoyed, as part and parcel thereof, (*except*, and always reſerved out of this preſent leaſe, unto the ſaid *A. A.* his heirs, and aſſigns, all timber and timber-like trees, and all other trees whatſoever but the fruit trees for their fruit only, and the pollard trees for their lops and tops only, which now are, or at any time or times hereafter ſhall be ſtanding, growing, and being in, upon, and about the ſaid leaſed premiſſes, or any part thereof, with free liberty of ingreſs, egreſs, and regreſs, to and for the ſaid *A. A.* his heirs,* and aſſigns, ſervants, and workmen, from time to time, and at all times during the term hereby leaſed, the ſame to fell, ſtock up, cut down, hew, and carry away, in and through the ſaid leaſed premiſſes, or any part thereof, doing no wilful hurt or damage to the grain and graſs of the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, and alſo except to the ſaid *A. A.* his heirs and aſſigns, at all times during the term hereby leaſed, free liberty to enter into, and upon the ſaid premiſſes, and every part thereof, to view the condition of the repairs thereof,) *to have and to hold* the ſaid meſſuage, tenement, or farm houſe, cloſes, pieces or parcels of arable land, meadow, paſture ground, and premiſſes, with their, and every of their appurtenances, (except as before excepted) unto the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, from the feaſt of next enſuing the date hereof, for and during, and unto the full end and term of years, thence next enſuing, and fully to be complete and ended, *yielding and paying*, therefore yearly, and every year during the ſaid term, unto the ſaid *A. A.* his heirs, or aſſigns, at or in his now dwelling houſe, ſituate, *&c.* the yearly

General words.

More parcels.

Exception of trees, &c.

With ingreſs, &c. for he leſſor, &c.

And liberty to view, &c.

Habendum.

For years.

* Where the *leſſor* has the *freehold*, make the *exception*, *reſervation*, &c. to *him*, his *heirs*, and *aſſigns*, and not *heirs*, *executors*, *adminiſtrators*, and *aſſigns*; ſo he may covenant for *himſelf*, his *heirs*, and *aſſigns*; and it is ſufficient; *executors*, and *adminiſtrators*, are ſuperfluous, they are his *aſſigns* in law of courſe, but have nothing to do with the freehold as ſuch: but where the *leſſor* has *not* the *freehold*, then make the *exception*, *reſervation*, &c. to *him*, his *executors*, *adminiſtrators*, and *aſſigns*, and the covenants from *him*, his *executors*, *adminiſtrators*, and *aſſigns*, though here it is uſual to make him covenant for *himſelf*, his *heirs*, *executors*, *adminiſtrators*, and *aſſigns*, that *he*, his *executors*, *adminiſtrators*, and *aſſigns*, ſhall and will, &c. in which caſe the *heir* will be bound.

rent

rent or ſum of *l.* of lawful money of the United Kingdoms of *Great Britain* and *Ireland*, at the two moſt uſual feaſts or days of payment in the year, that is to ſay, the feaſts of , and in every year, the firſt payment thereof to begin and be made on the feaſt day of next enſuing the date hereof, and alſo *yielding and paying* thereof yearly, and every year during the ſaid term, unto the ſaid *A. A.* his heirs, and aſſigns, at or in his now dwelling houſe, ſituate, *&c.* the yearly rent or ſum of *l.* of lawful money of the United Kingdom of *Great Britain* and *Ireland*, at the two moſt uſual feaſts or days of payment in the year, that is to ſay, the feaſts of and in every year, the firſt payment thereof to begin and be made on the feaſt day of next enſuing the date hereof, and alſo *yielding and paying* therefore yearly, and every year during the ſaid term, unto the ſaid *A. A.* his heirs, and aſſigns, on the days and place, and in manner aforeſaid, (over and above the ſaid yearly rent of *l.* herein before reſerved,) for every acre of meadow or paſture ground hereby leaſed, that the ſaid *B. B.* his executors, adminiſtrators or aſſigns, ſhall plough, dig up, or convert into tillage, the ſum of *l.* of like money, and ſo proportionably after that rate, for every greater or leſs quantity than an acre, the firſt payment of the ſaid *l.* per acre to be made on the firſt of the ſaid feaſts, which ſhall next happen after the ploughing or digging up any part of the ſame meadow or paſture ground. *Provided always*, nevertheleſs, that if it ſhall happen that the ſaid yearly rents, hereby reſerved, or either of them, or any taxes, levies, and aſſeſſments, which ſhall be rated or aſſeſſed on the ſaid hereby leaſed premiſſes, (except land tax) ſhall be behind and unpaid by the ſpace of twenty-one days, next over or after either of the ſaid feaſts or days of payment, whereon the ſame ought to be paid as aforeſaid, (being lawfully demanded,) or if the ſaid *B. B.* his executors, or adminiſtrators, ſhall aſſign over, or otherwiſe depart with this indenture, or the premiſſes hereby leaſed, or any part thereof, to any perſon or perſons whatſoever, (except the ſaid two cottages,) without the conſent of the ſaid *A. A.* his heirs and aſſigns, firſt had and obtained in writing, under his or their hands and ſeals for that purpoſe, then, and in either of the ſaid caſes, it ſhall and may be lawful, to, and for the ſaid *A. A.* his heirs or aſſigns, into the ſaid premiſſes hereby leaſed, or any part thereof in the name of the whole, to re-enter, and the ſame to have again, retain, and repoſſeſs, and enjoy, as in his and their firſt and former eſtate or eſtates, any thing herein contained to the contrary thereof, in anywiſe notwithſtanding. *And* the ſaid *B. B.* doth hereby for himſelf, his heirs, executors, adminiſtrators, and aſſigns, covenant, promiſe, and agree, to and with the ſaid *A. A.* his heirs, and aſſigns, in manner following, (that is to ſay,) that he the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall and will, well and truly pay, or cauſe to be paid unto the ſaid

For years.

Paying at the leſſor's dwelling houſe a certain rent.

And an additional rent for ploughing.

Proviſo on non-payment.

Or aſſignment by the leſſee without conſent, the leſſor may re-enter.

The leſſee covenants for payment of the rents, &c.

A. A. his heirs, and aſſigns, the ſaid yearly rent of *l.* and alſo the ſaid rent of *l.* per acre, *per annum*, for ploughing up any meadow, or paſture, as aforeſaid, at the days, times, and places, and in ſuch manner as are hereinbefore limited and appointed for payment thereof, according to the reſpective reſervation thereof, and the true intent and meaning of theſe preſents. *And alſo* that the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall and will, at his and their own proper coſts and charges, well and ſufficiently repair, maintain, amend, ſcower, cleanſe, preſerve, and keep in repair the ſaid meſſuage, tenement or farm houſe, and all other the houſes, out-houſes, edifices, buildings, barns, ſtables, dove-houſes, gates, rails, pales, ſtiles, hedges, fences, and mounds, belonging to the ſaid hereby leaſed premiſſes, from time to time during this preſent leaſe, (he the ſaid *A. A.* his heirs, and aſſigns, upon requeſt and notice to them made, finding and allowing on the ſaid premiſſes, or within four miles diſtance thereof, all rough timber, brick, lime, tiles, and all other materials whatſoever (except ſtraw) for doing thereof, to be carried to the ſaid hereby leaſed premiſſes, at the charge of the ſaid *B. B.* his executors, adminiſtrators, or aſſigns.) And the ſame premiſſes, ſo repaired, amended, and kept in repair, as aforeſaid, at the end, expiration, or other ſooner determination of this preſent leaſe, ſhall and will yield up unto the ſaid *A. A.* his heirs or aſſigns. *And alſo* that the ſaid *B. B.* his heirs, adminiſtrators, or aſſigns, ſhall not, nor will at any time during this preſent leaſe, crop, or ſow, above two years together, any of the arable lands and cloſes hereby leaſed, but every third year permit the ſame to lie fallow and unſown. *And* that it ſhall and may be lawful, to and for the ſaid *A. A.* his heirs, and aſſigns, with ſervants, horſes, ploughs, carts, and other neceſſaries, at day next preceding the expiration of this preſent leaſe, to enter upon ſuch cloſes and grounds, parcel of the ſaid hereby leaſed premiſſes, as then ought to lie fallow and unſown, and the ſame to plough, fallow, and manure, and to have the graſs, herbage, ſheep walks, and ſheep commons thereof, and alſo to enter upon the dung which ſhall be then in the yard or yards, and at the ſame time to have the dung in the dove-houſe, and the hen-dung in the hen-houſe. And alſo to have ſome convenient place in the ſaid dwelling houſe, for his and their ſervants to lodge and diet in, and ſome convenient place to lay hay and chaff in, and ſome convenient ſtable for their horſes to ſtand and be in, without extinguiſhment of any of the yearly rents hereinbefore reſerved, and without giving or making any allowance or ſatisfaction for the ſame. *And further*, that the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall not at any time or times during the laſt two years of the ſaid term, ſell, give away, or otherwiſe diſpoſe of any of the ſtraw which ſhall be growing and ariſing upon the ſaid leaſed premiſſes, and ſhall not

And for repairs

The landlord to find all rough timber.

The tenant covenants not to ſow the ſame above two years together, and that the leſſor may enter within the term to plough the fallow ground.

And to have the dung and lodging for ſervants, &c.

The leſſee not to diſpoſe of ſtraw within the laſt two years.

not burn any ſtraw, except it be for the neceſſary ſingeing of his and their hogs, for the uſe of their own families. *And* that the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall and will lay in and in-barn all the crops of grain, which ſhall be growing and ariſing upon the ſaid hereby leaſed premiſſes, in every year of the ſaid term, in the barns and rick-yards belonging to the ſaid leaſed premiſſes, and not elſewhere, and the ſame there thraſh out, and the ſtraw and ſtover which ſhall ariſe therefrom and thereby, turn into the yard and yards, and the ſame feed up with his or their cattle, for the better increaſe and making of dung, and the dung and ſoil which ſhall ariſe thereby, lay, ſpread and beſtow upon the hereby demiſed premiſſes, in a huſbandlike manner, and not elſewhere; and ſhall and will leave unto, and for the uſe of the ſaid *A. A.* his heirs, or aſſigns, all the dung and compoſt which ſhall be made on the ſaid leaſed premiſes the three laſt years of the ſaid term, which ſhall ariſe from the two laſt crops of corn and grain, for manuring the premiſſes, or otherwiſe to be diſpoſed of as he the ſaid *A. A.* his heirs, and aſſigns, ſhall think fit and convenient; and that the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall ſow the three laſt years of this preſent leaſe, one third part of the edge crop with peas or vetches. *And* that the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall and will, at all times, during the term hereby leaſed, endeavour to preſerve and keep the dove houſe, with a good flight of pigeons, dove-houſe like, and at the end, expiration, or other ſooner determination of the ſaid term of years, ſhall and will give up the ſame, ſo preſerved and kept, into the hands of the ſaid *A. A.* his heirs, and aſſigns. *And* that the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall and will, at all times during the ſaid term of years hereby leaſed, bear, pay, and diſcharge all ſuch taxes, levies, and aſſeſſments whatſoever, as ſhall be taxed, rated, levied, or aſſeſſed upon the ſaid hereby leaſed premiſſes, land tax only excepted. *And* that he the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, ſhall not nor will, at any time or times during this preſent leaſe, cut, plaſh, or new-make any of the hedges belonging to the hereby leaſed premiſſes, but ſuch as ſhall be of twelve years growth, and thoſe only at ſeaſonable times in the year; and when the cloſes and ground to which ſuch hedges belong ſhall be ſown with wheat, rye, or barley, on a ſummer's tilth, or be cloſes of old paſture, and after the ſame ſhall have been cut, plaſhed, or new-made, as aforeſaid, the ſame preſerve and keep from biting, or deſtruction by cattle or otherwiſe, and ſhall and will, at ſuch cutting and plaſhing thereof, cleanſe and ſcower the ditches, againſt ſuch hedge or hedges, where ditches have been heretofore, and do lie next to any lane or highway, and the offal wood which ſhall ariſe by the cutting or plaſhing of ſuch hedges, faggot and make up, and carry unto

And to in the corn upon the premiſſes.

And to uſe the ſtraw there.

To ſow peas &c. in the latte years.

To preſerve pigeons.

To pay taxes, &c.

Not to cut hedges under a certain growth, &c.

And to ſpend wood in the houſe.

the ſaid leaſed meſſuage, or farm-houſe, there to be ſpent by way of fire wood, and not to be ſold or diſpoſed of in any other manner whatſoever. *And* that the ſaid *A. A.* his executors, adminiſtrators, and aſſigns, ſhall not, nor will, at any time or times during the term hereby leaſed, lop, top, ſhred, or cut, any of the trees or ſpring wood belonging to the ſaid leaſed premiſſes, but ſuch pollard trees, and ſpring wood, as have been uſually lopped, and cut by former and other tenants, and thoſe only of twelve years growth, and the lops which ſhall ariſe and come therefrom, carry into the ſaid hereby leaſed meſſuage or farm-houſe, there to be ſpent by way of fire boot, and not to be ſold or diſpoſed of in any other way whatſoever, and ſhall not, nor will at any time or times during this leaſe, inordinately burn or waſte any of the fire-wood, which is ſo allowed to be ſpent by way of fire-boot, as aforeſaid, and ſhall preſerve and keep the ſaid pollard trees, as alſo all the fruit trees, and ſpring wood, belonging to the ſaid hereby leaſed premiſſes, from all wilful or negligent waſte. *And* the ſaid *A. A.* doth hereby for himſelf, his heirs, and aſſigns, covenant, promiſe, and agree, to, with the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, in manner following, (that is to ſay,) that he the ſaid *A. A.* his heirs, and aſſigns, ſhall and will from time to time, and at all times during this preſent leaſe, at ſeaſonable times for cutting timber, find, provide for, and allow unto the ſaid *B. B.* his executors, adminiſtrators, or aſſigns, on the ſaid premiſſes hereby leaſed, or within four miles diſtant therefrom, neceſſary rough timber, brick, lime, and tiles, and all other materials whatſoever, for the repairing and amending thereof, (except ſtraw) within forty days after notice of the want thereof, and demand of the ſame made by the ſaid *B. B.* his executors, adminiſtrators, or aſſigns, the ſaid materials to be carried to the ſaid leaſed premiſſes at the expence of the ſaid *B. B.* his executors, *&c.* *And* alſo ſhall and will from time to time, and at all times during this preſent leaſe, allow unto the ſaid *B. B.* his executors, adminiſtrators, or aſſigns, timber to be had and taken off and from the ſaid hereby leaſed premiſſes, (if any ſuch there be) for neceſſary plough-bote, to be uſed and ſpent upon the ſaid premiſſes, and not elſewhere, and to be ſet out for that purpoſe by the ſaid *A. A.* his heirs, or aſſigns, on ſuch notice as aforeſaid of the want thereof; and that the ſaid *A. A.* his heirs and aſſigns, ſhall and will permit and ſuffer the ſaid *B. B.* his executors, adminiſtrators, or aſſigns, to have the uſe of all the barns, yards, and granaries hereby leaſed, for the laying in, and threſhing out, of his or their crop of corn or grain, which ſhall be growing and ariſing upon the premiſſes in the laſt year of the ſaid term hereby leaſed, for the ſpending of the ſtraw and ſtover which ſhall ariſe therefrom, with horſes, cows, bullocks, and other cattle, until the feaſt of next after the end, expiration, or other ſooner determination of the ſaid term of

Not to lop trees except pollards.

The loppings to be ſpent in the houſe.

The leſſor covenants to find timber for repairs.

Upon notice.

And to allow plough-bote, if on the premiſſes.

And to allow room for threſhing the tenant's laſt crop for ſtraw.

of years; and alſo to have ſome convenient rooms in the ſaid hereby leaſed meſſuage or farm-houſe, for his, or their ſervants to lodge and diet in, and ſome convenient place for his and their horſes to ſtand and be in, and ſome convenient place to lay hay and chaff in, until the ſaid feaſt day of next after the determination of the ſaid term. *And laſtly*, that it ſhall and may be lawful, to and for the ſaid *B. B.* his executors, adminiſtrators, and aſſigns, (paying the rent hereinbefore reſerved, and performing the covenants and agreements hereinbefore mentioned and contained, and which on his and their part and behalf, are or ought to be paid, done and performed) peaceably and quietly to have, hold, occupy, poſſeſs, and enjoy, all and ſingular the ſaid hereby leaſed premiſſes, with the appurtenances, during the ſaid term of years hereby demiſed, without any moleſtation or interruption whatſoever, of, or by him, the ſaid *A. A.* his heirs or aſſigns, or of, or by any other perſon or perſons lawfully or equitably claiming or to claim, by, from, or under him, them, or any of them.

And room for ſervants.

And that the leſſee may enjoy &c.

In witneſs, *&c.*

An Indorſement for continuing a Leaſe for a longer Term, after the Expiration of the Preſent.

THIS INDENTURE, *&c.* between the within named *A. B.* of the one part, and the within named *C. D.* of the other part, *witneſſeth*, that for and in conſideration of the rent hereby reſerved, and of the covenants, conditions, and agreements reſpectively, hereinafter contained, which on the part and behalf of the ſaid *C. D.* his executors, adminiſtrators and aſſigns, are to be paid, done and performed, the ſaid *A. B. hath* demiſed, leaſed, ſet and to farm let, unto the ſaid *C. D.* his executors, adminiſtrators and aſſigns, *all* that piece or parcel of ground, with the meſſuage or tenement, thereon erected and built, and all and ſingular other the premiſſes reſpectively, compriſed in the within written leaſe, and thereby demiſed to the ſaid *C. D.* (except as therein is excepted,) *to have and to hold* the ſaid piece or parcel of ground, and meſſuage or tenement, and all and ſingular other the premiſſes hereby leaſed, ſet, and to farm let, or mentioned, or intended ſo to be, (except as aforeſaid) unto the ſaid *C. D.* his executors, adminiſtrators and aſſigns, from the day of , which will be in the year of our Lord , and when the ſaid within written leaſe will expire, for and during, and unto the full end and term of years longer, from thence next enſuing, and fully to be complete and ended, ſubject to, and under the like rent, and payable in like manner, as is within mentioned, for and in reſpect of the rent reſerved, in and by the ſaid within written leaſe, and ſubject to the like power of entry, as well on non-payment of rent, as on the happening of any of the other incidents mentioned in the within

written proviſo or condition of re-entry, *and* it is hereby declared and agreed, by and between the ſaid parties to theſe preſents, that they, and their reſpective heirs, executors, adminiſtrators and aſſigns, ſhall and will, by theſe preſents, during the continuance of the additional term of years hereby granted, ſtand, and be bound, for and in reſpect of the ſaid hereby demiſed premiſſes with the appurtenances, in ſuch and the like covenants, conditions, and agreements reſpectively, as they the ſaid parties and their reſpective heirs, executors, adminiſtrators, and aſſigns do now ſtand bound, in and by the ſaid within leaſe, for and during the now reſidue unexpired of the within mentioned term hereby granted, it being the intent and meaning hereof, that this preſent endorſed leaſe, and the additional term hereby granted, ſhall be upon ſuch and the like footing, and all the covenants, clauſes, conditions, and agreements reſpectively therein contained, be equally available, take place, and have the like force and effect, to all intents and purpoſes, as if every article, clauſe, matter, and thing, contained in the ſaid within leaſe, were inſerted and contained in this preſent indenture.

In witneſs, *&c.*

A Building Leaſe.

THIS INDENTURE, made, *&c.* between *A. B. &c.* of the one part, and *C. D.* of the other part, *witneſſeth*, that the ſaid *A. B.* for and in conſideration of the rents, covenants, and agreements, hereinafter reſerved and contained, by, and on the part and behalf of the ſaid *C. D.* his executors, adminiſtrators, and aſſigns, to be paid, done, and performed, *hath* demiſed, leaſed, ſet, and to farm let, and by theſe preſents *doth* demiſe, leaſe, ſet, and to farm let, unto the ſaid *C. D.* his executors, adminiſtrators, and aſſigns, *all* that piece or parcel of ground, ſituate, lying and being, on, *&c.* in the ſaid pariſh of containing in breadth on the north ſide thereof and in depth on the eaſt ſide thereof be the ſame more or leſs, and on the weſt ſide thereof eaſt and from thence ſouth and from thence eaſt, be the ſame more or leſs, together with the meſſuages or tenements, and other the erections and buildings thereon, which the ſaid *C. D.* ſhall have full liberty to pull down, and to take to and for his own uſe; which ſaid piece or parcel of ground abuts north on aforeſaid, ſouth on gardens to ſome houſes on the north ſide of belonging to the ſaid *A. B.* now on leaſe to eaſt on buildings, *&c.* and weſt, *&c.* and is more fully delineated and deſcribed in the plan or ground plot thereof, in the margin of theſe preſents, together with all erections and buildings to be erected and built thereon, and all ways, paths, paſſages, drains, waters, water-courſes, eaſements, profits,

profits, commodities, and appurtenances, whatſoever, belonging, and which ſhall belong to the ſaid hereby demiſed premiſſes, or any part or parcel thereof, *to have and to hold* the ſaid piece or parcel of ground, meſſuages, or tenements, erections, buildings, and premiſſes hereby demiſed or intended ſo to be, with their and every of their appurtenances, unto the ſaid *C. D.* his executors, adminiſtrators, and aſſigns, from the day of laſt paſt, before the date hereof, for and during, and unto the full end and term of years, from thence next enſuing, and fully to be complete and ended, *yielding and paying* therefore for the firſt year of the ſaid term hereby demiſed, the rent of a pepper corn on the laſt day thereof, if demanded, and yielding and paying therefore yearly, and every year, for and during the remaining years of the ſaid term hereby demiſed, unto the ſaid *A. B.* his heirs and aſſigns, the yearly rent or ſum of *l.* of lawful money of the United Kingdoms of *Great Britain* and *Ireland*, by half yearly payments, on the and in each year, by even and equal portions, the firſt payment thereof to begin and be made on in the year of our Lord the ſaid ſeveral rents to be paid and payable from time to time, on the ſeveral feaſts aforeſaid, during the ſaid term, free and clear of all rates, taxes, charges, aſſeſſments, and payments whatſoever, taxed, charged, aſſeſſed, or impoſed upon the ſaid hereby leaſed premiſſes, or any part thereof, by authority of parliament, or otherwiſe howſoever, during the term hereby granted. *And* the ſaid *C. D.* for himſelf, his heirs, executors, adminiſtrators, and aſſigns, doth covenant, promiſe, and agree, to and with the ſaid *A. B.* his heirs and aſſigns, by theſe preſents, in manner following, (that is to ſay,) that the ſaid *C. D.* his heirs, executors, adminiſtrators, and aſſigns, ſhall and will yearly, and every year during the laſt years of the ſaid term hereby granted, well and truly pay, or cauſe to be paid unto the ſaid *A. B.* his heirs, and aſſigns, the ſaid yearly rent or ſum of *l.* of lawful money of the United Kingdoms of *Great Britain* and *Ireland*, on the ſeveral days and times, and in the manner hereinbefore limited and appointed for payment thereof, without making any deduction or abatement thereout, for, or in reſpect of any rates, taxes, aſſeſſments, duties, charges, or impoſitions whatſoever, taxed, charged, aſſeſſed, or impoſed upon the ſaid hereby demiſed premiſſes, or any part thereof, during the ſaid term hereby granted; all which rates, taxes, aſſeſſments, duties, charges, or impoſitions, he the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, ſhall and will bear, pay, and diſcharge, and therefore, and therefrom, acquit, ſave harmleſs, and keep indemnified the ſaid *A. B.* his heirs and aſſigns. *And* that he the ſaid *C. D.* his executors, adminiſtrators or aſſigns, ſhall and will, before the expiration of the firſt year of the term hereby granted, at his and their own proper coſts and charges, erect, build, complete, and

in a workman-like manner finiſh, one or more good and ſubſtantial brick meſſuages or tenements, upon ſome part of the ground hereby demiſed, and ſhall and will lay out and expend therein the ſum of *l.* or upwards, and alſo that he the ſaid *C. D.* his executors, adminiſtrators, and aſſigns, ſhall and will, from time to time, and at all times, from and after the ſaid meſſuage or tenement, erections and buildings on the ſaid piece of ground hereby demiſed, ſhall be reſpectively completed and finiſhed, during the remainder of the ſaid term hereby granted, when, where, and as often as need or occaſion ſhall be and require, at his and their own proper coſts and charges, well and ſufficiently repair, uphold, ſupport, maintain, pave, purge, ſcour, cleanſe, empty, amend, and keep the ſaid meſſuage or tenement, meſſuages or tenements, erections and buildings, and all the walls, rails, lights, pavements, grates, privies, ſinks, drains, and watercourſes thereunto belonging, and which ſhall belong to the ſame, in, by, and with all and all manner of needful and neceſſary reparations, cleanſings, and amendments whatſoever. *And* that he the ſaid *C. D.* his executors, adminiſtrators, and aſſigns, ſhall not, nor will, dur ng the ſaid term hereby granted, permit, or ſuffer, any perſon or perſons to uſe, exerciſe, or carry on, in and upon the ſaid hereby demiſed premiſſes, or any part thereof, any trade or buſineſs, which may be nauſeous or offenſive, or grow to the annoyance, prejudice, or diſturbance of any of the other tenements of the ſaid *A. B.* near adjoining thereto, and the ſaid meſſuage, or tenement, meſſuages, or tenements, erections, buildings, and premiſſes, with the walls, pavements, ſewers, and drains belonging thereto, being in every reſpect ſo well and ſufficiently repaired, upheld, ſupported, ſuſtained, maintained, paved, purged, ſcoured, cleanſed, emptied, amended, and kept, ſhall and will, at the expiration, or other ſooner determination of the ſaid term hereby granted, peaceably and quietly leave, ſurrender, and yield up unto the ſaid *A. B.* his heirs and aſſigns, together with all the doors, locks, keys, bolts, bars, wainſcots, chimney-pieces, ſlabs, foot-paces, windows, window-ſhutters, partitions, dreſſers, ſhelves, pumps, water-pipes, rails, and all other things which ſhall be any ways fixed and faſtened to, and ſhall be ſtanding, being and ſet up, in and upon the ſaid premiſſes hereby demiſed, or any part thereof within the laſt years of the ſaid term hereby granted. *And* that he the ſaid *C. D.* his executors, adminiſtrators, and aſſigns, ſhall and will, at his and their own proper coſts and charges, from time to time ſufficiently inſure all and every the meſſuages or tenements, erections and buildings, which ſhall be erected and built upon the ſaid piece or parcel of ground hereby demiſed, or any part thereof, from caſualties by fire, during the then remainder of the ſaid term hereby granted, in ſome or one of the public offices kept for that purpoſe, in *London* or *Weſtminſter*;

ſter; and in caſe the ſaid meſſuage or tenements, erections and buildings, or any of them, or any part of any of them, ſhall, at any time or times, during the ſaid term, be burnt down, deſtroyed, or damaged by fire, ſhall and will, from time to time, immediately afterwards, rebuild, or well and ſufficiently repair the ſame. *And further*, that it ſhall and may be lawful, to and for the ſaid *A. B.* his heirs and aſſigns or any of them, with workmen or others, in his, their, or any of their company, or without, to enter or come into and upon the ſaid demiſed premiſſes, and every part thereof, at ſeaſonable and convenient times, in the day time, as well at any time or times, during the laſt ſeven years of the ſaid term hereby granted, to make an inventory or ſchedule of the ſeveral fixtures and things then ſtanding and being, in and upon the ſaid hereby demiſed premiſſes, which are to be left at the end of the ſaid term, to and for the uſe of the ſaid *A. B.* his heirs and aſſigns, purſuant to the covenant hereinbefore in that behalf contained, as alſo twice or oftener in every year, during the ſaid term hereby granted, to view, ſearch, and ſee the defects and want of reparations of the ſaid premiſſes, and of all defects and want of reparations, which upon every or any ſuch view or ſearch ſhall be, from time to time found to give or leave notice or warning thereof in writing, at or upon the ſaid demiſed premiſſes, unto, and for the ſaid *C. D.* his executors, adminiſtrators or aſſigns, to repair and amend the ſame. *And* that the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, ſhall and will, within three months next after every ſuch notice or warning ſhall be given or left, at his and their own proper coſts and charges, well and ſufficiently repair, amend, and make good, all and every the defects and want of reparations, whereof ſuch notice or warning ſhall be ſo given or left as aforeſaid. *Provided always*, nevertheleſs, and theſe preſents are upon this condition, that if the ſaid yearly rent, or ſum of *l.* hereby reſerved, or any part thereof, ſhall be behind and unpaid, by the ſpace of days, next after either of the ſaid feaſts or days of payment, whereon the ſame ought to be paid as aforeſaid, (being lawfully demanded,) or if the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, ſhall not well and truly obſerve, perform, fulfil and keep all and every, the covenants, articles, clauſes, conditions, and agreements, in theſe preſents expreſſed and contained, on his and their part and behalf to be performed and kept according to the true intent and meaning thereof, then, and from thenceforth, in either of the ſaid caſes, it ſhall and may be lawful, to and for the ſaid *A. B.* his heirs and aſſigns, into, and upon the ſaid demiſed premiſſes, or any part thereof in the name of the whole, wholly to re-enter, and the ſame to have again, retain, repoſſeſs and enjoy, as in his, and their firſt and former eſtate, and the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, and all other

other tenants, or occupiers of the ſaid premiſſes, thereout, and from thence, utterly to expel, put out, and amove, and that from and after ſuch re-entry made, this preſent leaſe, and every clauſe, article and thing herein contained, on the leſſor's part and behalf, from thenceforth to be done and performed, ſhall ceaſe, determine, and be utterly void, to all intents and purpoſes whatſoever, any thing hereinbefore contained to the contrary thereof in anywiſe notwithſtanding. *And* the ſaid *A. B.* for himſelf, his heirs and aſſigns, doth hereby covenant, promiſe, and agree, to and with the ſaid *C. D.* his heirs, executors, adminiſtrators and aſſigns, paying the ſaid yearly rent hereby reſerved, in manner and form aforeſaid, and obſerving, performing and keeping, all and ſingular the covenants and agreements, hereinbefore mentioned, on his and their parts and behalf to be performed and kept, ſhall and may lawfully, peaceably and quietly have, hold, occupy, poſſeſs, and enjoy the ſaid piece or parcel of ground and premiſſes hereby demiſed, with their, and every of their appurtenances, for and during the ſaid term of years hereby granted, without any lawful let, trouble, denial or interruption, of or by the ſaid *A. B.* his heirs or aſſigns, or any other perſon or perſons, lawfully claiming or to claim, by, from, or under him, them, or any of them.

In witneſs, *&c.*

Leaſe of a Houſe in a Town.

Parties. THIS INDENTURE, made *&c.* between *A. A.* of *&c.* of the one part, and *H. H.* of *&c.* of the other part, *witneſſeth*, that for and in conſideration of the yearly rent, and of the covenants, proviſoes, and agreements, hereinafter reſerved and contained, by and on the part and behalf of the ſaid

Demiſe. *H. H.* his executors, adminiſtrators, and aſſigns, to be paid, obſerved, and performed, he the ſaid *A. A.* hath demiſed and leaſed, and by theſe preſents doth demiſe and leaſe unto the ſaid *H. H.* his executors, adminiſtrators, and aſſigns, *all* that meſſuage or tenement and dwelling houſe, ſituate and being on the ſide or part of ſtreet, in the pariſh

Premiſſes. of in the city of London, together with [*here deſcribe the particulars of the premiſſes*]; And alſo all ways, paſ-

General words. ſages, lights, eaſements, rooms, vaults, cellars, areas, yards, water-courſes, profits, conveniences, hereditaments, and appurtenances, whatſoever, to the ſaid meſſuage or premiſſes hereby demiſed, belonging or in any ways appertaining, or reputed or known to be part, parcel or member thereof: all and ſingular which ſaid meſſuage and premiſſes are now or

Habendum for 21 years. lately were in the occupation of *G. G.* his aſſignee or aſſigns, to have and to hold the ſaid meſſuage or tenement and premiſſes, with the appurtenances hereby demiſed, or ſo mentioned to be unto the ſaid *H. H.* his executors, adminiſtrators, and aſſigns, from the 25th day of December laſt paſt,

for

for and during the term of twenty-one years, thence next enſuing, and fully to be complete and ended, determinable nevertheleſs at the expiration of the firſt ſeven or fourteen years thereof, upon ſuch conditions as is herein-after mentioned: he the ſaid *H. H.* his executors, adminiſtrators, and aſſigns, yielding and paying yearly and every year during the ſaid term, unto the ſaid *A. A.* his executors, adminiſtrators and aſſigns, the yearly rent or ſum of pounds, of lawful money of the United Kingdoms of *Great Britain* and *Ireland*, the ſame to be paid by equal quarterly payments on the reſpective days following: namely, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December*, in every year, (ſave and except, at all times during the ſaid term, ſuch proportionable part of the ſaid yearly rent of pounds as ſhall or may grow due during ſuch time, or the meſſuage or tenement hereby demiſed, ſhall without the hindrance of the ſaid *H. H.* his executors, *&c.* be and remain uninhabitable by reaſon of accidental fire,) and to be clear of all and all manner of parliamentary, parochial and other taxes, aſſeſſments, rates and deductions whatſoever; the firſt quarterly payment thereof to commence and be made on the 24th day of *June*, next enſuing the date of theſe preſents. And the ſaid *H. H.* doth hereby for himſelf, his executors, *&c.* covenant, promiſe and agree to and with the ſaid *A. A.* his executors, *&c.* that he the ſaid *H. H.* his executors, *&c.* ſhall and will yearly and every year during the continuance of the ſaid term hereby demiſed (ſave and except as aforeſaid,) well and truly pay, or cauſe to be paid unto the ſaid *A. A.* his executors, *&c.* the ſaid yearly ſum or rent of pounds, of lawful money of the United Kingdoms of Great Britain and Ireland on the reſpective days, and in the manner the ſame is hereinbefore made payable. And alſo ſhall and will well and truly pay, or cauſe to be paid, all and all manner of taxes, aſſeſſments, rates, and impoſitions whatſoever, parliamentary, parochial or otherwiſe, (the land-tax only excepted,) which now are, or ſhall at any time during the continuance of the ſaid term hereby demiſed, be aſſeſſed, rated, or impoſed on the ſaid demiſed meſſuage or tenement, and premiſſes, or any part thereof, or on the ſaid yearly rent hereby reſerved, or any part thereof, or on the ſaid *H. H.* his executors, *&c.* on account thereof. And alſo that he the ſaid *H. H.* his executors, *&c.* ſhall and will at his and their own proper coſts and charges, cauſe to be well and ſufficiently painted, all the outſide wood and iron work belonging to the ſaid meſſuage or tenement and premiſſes hereby demiſed, every third year during the continuance of the ſaid term, and at his and their like proper coſts and charges, ſhall and will at all times during the continuance of the ſaid term, keep in a good, ſufficient, and tenantable ſtate of repair, as well all and ſingular the glaſs and other windows, wainſcots, rooms, floors, partitions, ceilings, tilings, walls, rails, fences, pavements,

Determinable at the end of 7 or 14 years.

At the rent of &c.

Exception as to fire.

Covenant to pay rent.

And taxes (except land-tax.)

Covenant that leſſee ſhall paint every 3d year.

And do other repairs.

pavements, grates, ſinks, privies, drains, wells, and water-courſes, as alſo all and every other the parts and appurtenances of the ſaid meſſuage or tenement and premiſſes hereby demiſed, (damage happening by caſual fire only excepted,) And further, that it ſhall be lawful for the ſaid *A. A.* his executors, *&c.* either alone or with others, twice in every year during the ſaid term hereby granted, at ſuch times of the year as to him or them ſhall ſeem meet, to enter at ſeaſonable times of the day into and upon the ſaid meſſuage or tenement and premiſſes hereby demiſed and every part thereof, and there to view and examine the ſtate and condition thereof, notice of ſuch intention to view being at all times previouſly given unto the ſaid *H. H.* his executors, *&c.* one day at leaſt before the ſame ſhall take place; and in caſe any decay or want of reparation be found on ſuch view, the ſaid *H. H.* for himſelf, his executors, *&c.* doth hereby covenant, promiſe and agree, to and with the ſaid *A. A.* his executors, *&c.* to cauſe the ſame to be well and ſufficiently repaired and amended within the ſpace of ſix months after notice thereof in writing ſhall have been given to him or them for that purpoſe. And the ſaid *H. H.* doth for himſelf, his executors, *&c.* promiſe, covenant, and agree, to and with the ſaid *A. A.* his executors, *&c.* that he the ſaid *H. H.* his executors, *&c.* at the end or earlier determination of the ſaid term hereby granted, ſhall and will leave and yield up unto the ſaid *A. A.* his executors, *&c.* all and ſingular the ſaid meſſuage or tenement and premiſſes, with their appurtenances, in ſuch good, ſufficient and tenantable ſtate of repair as aforeſaid, together with all and every the doors, locks, keys, bolts, bars, chimney-pieces, dreſſers, ſhelves, water-pipes, and other things mentioned in an inventory or ſchedule, * hereunder written or hereunto annexed, in as good plight and condition as the ſame now are, (reaſonable uſe and wear thereof and caſualties happening by fire only excepted,) Provided always, and theſe preſents are upon this expreſs condition, that if the ſaid yearly rent hereby reſerved, or any part thereof, ſhall be in arrears and unpaid for the ſpace of days next after any of the days whereon the ſame is hereinbefore covenanted to be paid as aforeſaid, (it being firſt lawfully demanded,) or if the ſaid *H. H.* his executors, *&c.* ſhall not well and truly obſerve, and keep, according to their true intent and meaning, all and every the covenants, clauſes, proviſoes and agreements by him and them to be obſerved and kept, then and from thenceforth in either of the ſaid caſes, it ſhall be lawful for the ſaid *A. A.* his executors, *&c.* to re-enter into and upon the ſaid hereby demiſed meſſuage or tenement and premiſſes, or any part thereof, in the name of the whole, and the ſame to have again, re-poſſeſs, retain and enjoy, as his and their former eſtate, and the ſaid *H. H.* his executors, *&c.* and all other tenants and occupiers of the ſaid premiſſes,

Power to leſſor to view the ſtate of the repairs.

After notice.

Covenant for leſſee to quit at the end of the term, and to leave the premiſſes in repair, &c.

Proviſo for leſſor to re-enter, &c.

* This inventory muſt be ſtamped.

there-

thereout utterly to eject and remove, and that from and after ſuch re-entry made, this leaſe, and every clauſe and thing herein contained, ſhall determine, and be utterly void to all intents and purpoſes, any thing herein contained to the contrary notwithſtanding. And the ſaid *A. A.* for himſelf, his executors, *&c.* doth covenant, promiſe and agree, to and with the ſaid *H. H.* his executors, *&c.* by theſe preſents, in manner following, that is to ſay, that he the ſaid *H. H.* his executors, *&c.* paying the rent hereby reſerved in manner aforeſaid, and performing the covenants and agreements herein contained and by him and them to be performed, ſhall and lawfully may peaceably and quietly hold, occupy, and enjoy the meſſuage or tenement, and all other the premiſſes hereby demiſed, for and during the ſaid term of twenty-one years hereby granted, without any lawful action, ſuit, or interruption of the ſaid *A. A.* his executors, *&c.* or any other perſon lawfully claiming by, from, or under him, or any of them; and that freed and diſcharged, or otherwiſe by the ſaid *A. A.* his executors, *&c.* ſaved harmleſs and indemnified from the rents and covenants reſerved and contained in a certain indenture of leaſe, bearing date the day of in the year of our Lord whereby the ſaid *A. A.* holdeth the ſaid meſſuage or tenement and premiſſes hereby demiſed, from the date thereof for the term of ſixty-one years, and from all claims and demands whatſoever in reſpect thereof. And the ſaid *A. A.* doth hereby further covenant, promiſe, and agree to and with the ſaid *H. H.* his executors, *&c.* that the ſaid *A. A.* his executors, *&c.* ſhall and will, before the expiration of this preſent leaſe, on the requeſt, and at the coſts and charges of the ſaid *H. H.* his executors, *&c.* grant and execute unto him and them, a new and freſh leaſe of the meſſuage or tenement, and all other the premiſſes hereby demiſed, with their appurtenances, for the further term of years, to commence from the expiration of the term hereby granted, the ſame to be at the ſame yearly rent, payable in like manner, and under and ſubject to the like covenants, proviſoes and agreements, (except a covenant for the renewal thereof at the end of ſuch further term,) as are contained in theſe preſents, ſuch new leaſe however to be granted and be valid, only on condition that the ſaid *H. H.* his executors, *&c.* do execute a counter-part thereof, and alſo pay unto the ſaid *A. A.* his executors, *&c.* the ſum of pounds of lawful money, *&c.* at the time of executing the ſaid leaſe, as and by way of fine or premium for the renewal thereof. *And alſo*, that if the ſaid *H. H.* his executors, *&c.* ſhall be deſirous to quit the ſaid meſſuage or tenement and premiſſes hereby demiſed, at the expiration of the firſt ſeven or the firſt fourteen years of the term of twenty-one years hereby granted thereof; and of ſuch his or their deſire, ſhall give notice in writing to the ſaid *A. A.* his executors, *&c.* ſix calendar months before the expiration of the ſaid firſt ſeven or fourteen, (as the caſe may be,) then and in ſuch caſe,

Covenant that leſſee ſhall quietly enjoy the premiſſes.

Free from the original leaſe.

Covenant for the renewal of the leaſe;

And for determining the preſent one at 7 or 14 years end at the leſſee's option.

leaſe, (all arrears of rent being duly paid, and the ſaid meſſuage or tenement, and all other the premiſſes hereby demiſed, being in ſuch repair as they are hereinbefore covenanted to be maintained and left in,) this leaſe and every clauſe and thing herein contained, ſhall, at the expiration of ſuch firſt ſeven or firſt fourteen years of the ſaid term of twenty-one years hereby granted, (whichever be in the ſaid notice expreſſed,) determine and be utterly void to all intents and purpoſes, in like manner as if the whole term of twenty-one years had ran out and expired, any thing in theſe preſents contained to the contrary notwithſtanding. In witneſs whereof the ſaid parties have hereunto ſet their hands and ſeals, the day and year firſt above written.

A. A. (Seal)
H. H. (Seal)

Sealed and delivered in the preſence of
B. B. of
C. C. of

An Indorſement to continue the Term of an expiring Leaſe.

THIS INDENTURE made the day of in the year of our Lord and in the year of the reign of our Sovereign Lord George the Third *&c.* between the within named *K. L.* of the one part, and the within-named *M. N.* of the other part, *witneſſeth*, That in conſideration of the rent hereby reſerved, and of the covenants, proviſoes and agreements herein contained, by and on the part and behalf of the ſaid *M. N.* to be paid, obſerved and performed, the ſaid *K. L.* his executors, *&c.* doth demiſe and leaſe unto the ſaid *M. N.* his executors, *&c.* *All* that piece or parcel of ground, with the meſſuage or tenement thereon erected, and all and ſingular other the premiſſes compriſed in the within written leaſe, and thereby demiſed or mentioned ſo to be. To have and to hold the ſaid piece or parcel of ground, or meſſuage or tenement, and premiſſes, unto the ſaid *M. N.* his executors, *&c.* from the day of which will be in the year of our Lord when the within written leaſe will expire and determine, for and during, and unto the full end and term of years thence next enſuing, ſubject to and under the ſame rent, as in the within written leaſe is reſerved, and alſo ſubject to the like power of re-entry, on the non-payment of the rent, or the happening of any other of the incidents mentioned in the proviſo for re-entry within written. And it is hereby declared and agreed, by and between the parties to theſe preſents, that they and their reſpective executors, *&c.* ſhall and will, during the continuance of the additional term of years hereby granted, ſtand to and be bound by ſuch and the like covenants, proviſoes and agreements, as they, their

Habendum.

their reſpective executors, &c. are now bound by according to the within written leaſe, in reſpect of the ſaid meſſuage or tenement and premiſſes thereby and hereby granted, it being the intent and meaning of the parties hereto that this indorſed leaſe and the additional term hereby granted, ſhall be upon ſuch and the like footing as is the leaſe within written, and that all the covenants, proviſoes, and agreements in the within-written leaſe contained be equally available and have the like force and effect to all intents and purpoſes as if the ſame and every thing in the ſaid leaſe contained were repeated and inſerted in theſe preſents.

In witneſs whereof, &c.

Sealed and delivered in the preſence of
S. T.
V. R.

K. L. (Seal)
M. N. (Seal)

Covenant by the Leſſee not to uſe or aſſign the Premiſſes for any offenſive Trade.

AND alſo that the ſaid *C. D.* his executors, &c. ſhall not nor will, at any time during the continuance of the ſaid term hereby granted, uſe or carry on, or ſuffer or permit to be uſed or carried on, in the ſaid demiſed meſſuage or tenement and premiſſes, or aſſign over the preſent indenture of leaſe, or ſet over, let or aſſign any part of the ſaid meſſuage or tenement and premiſſes, to any perſon or perſons uſing or carrying on the trade, buſineſs or calling of a maker of ſedan or other chairs, baker, brewer, butcher, currier, diſtiller, dyer, founder, ſmith, ſoap-boiler, ſchool-maſter or ſchool-miſtreſs, ſugar-baker, auctioneer, pewterer, tallow-chandler or tallow-melter, working brazier, tinman, tripe-boiler, pipe-maker, pipe-borer, plumber, or any other noxious or offenſive trade, buſineſs, or calling whatſoever, without the conſent in writing of the ſaid *A. B.* his executors, &c. firſt had and obtained for that purpoſe, nor ſhall nor will, without ſuch conſent as aforeſaid, make or cauſe to be made any addition or alteration whatever, in, upon, or about the ſaid meſſuage or tenement and premiſſes, or any part thereof.

An Aſſignment by Note in writing indorſed on the Leaſe.

January 15, 1802. THE within-named *N. O.* hath this day aſſigned and made over unto the underſigned *P. Q.* of in the pariſh of in the county of all and ſingular the premiſſes and hereditaments in the within written leaſe comprized and deſcribed, and thereby granted, together with the whole eſtate and intereſt which he the ſaid *N. O.* hath therein. As witneſs their hands now hereto ſet.

Witneſs,
S. T.

N. O.
P. Q.

An

An Aſſignment of a Leaſehold Intereſt by Deed-poll indorſed on the Leaſe.

KNOW all men by theſe preſents, that I the within named *A. B.* for and in conſideration of the ſum of five ſhillings of lawful money of the united kingdoms of *Great Britain* and *Ireland* to me in hand paid by *N. O.* of gent. at or before the enſealing and delivery of theſe preſents, the receipt whereof I do hereby acknowledge, have bargained, ſold, ſet over, and aſſigned, and by theſe preſents do bargain, ſell, ſet over, and aſſign unto the ſaid *N. O.* all and ſingular the meſſuage or tenement, yard, garden, coach-houſe, ſtables, out-houſes, and hereditaments, in and by the within-written indenture demiſed or mentioned ſo to be, with their appurtenances, and alſo all that ſmall garden at the end of and adjoining to the aforeſaid garden, with the ſummer-houſe and mount which were leaſed or agreed to be leaſed to me by the within named *E. F.* by agreement between us dated the day next before the day of the date hereof for twenty-one years or ſuch other term as is therein mentioned, at the yearly rent of ten pounds of ſaid lawful money of the united kingdoms of *Great Britain* and *Ireland*, payable quarterly, that is to ſay, at the feaſts of *&c.* and alſo all my eſtate, right, title, intereſt, term of years, claim and demand whatſoever, of, into, or out of the ſame meſſuage and other the premiſſes, or any or either of them or otherwiſe howſoever, together with the ſame indenture and agreement and all the benefit thereof, To have and to hold the ſaid meſſuage or tenement, buildings, gardens, ſummer-houſe, mount, and other the premiſſes hereby aſſigned or mentioned ſo to be, with the appurtenances, unto the ſaid *N. O.* his executors, adminiſtrators, and aſſigns, from henceforth, for all the now reſidue of the within mentioned term of twenty-one years, and of ſuch other term or terms as I the ſaid *A. B.* now have or ought to have therein reſpectively, ſubject nevertheleſs to the rents, covenants, and agreements in the ſaid indenture and agreement reſpectively reſerved and contained and agreed upon, and which from henceforth on the tenant's or leſſee's part are or ought to be paid, done and performed. In witneſs whereof, *&c.*

Forms of Notices to quit Poſſeſſion of the Premiſſes, Repair, &c.

[They need not be ſtamped.]

Notice by the Landlord to his Tenant.

SIR,

I Hereby give you notice to quit the premiſſes which you hold of me ſituate at in the county of on or before next.

Your's, *&c.*

[*the date.*] *A. B.* [*the landlord.*]

To *I. K.* [*the tenant in poſſeſſion.*]

Another Form, more particularly deſcribing the Premiſſes.

SIR,

YOU are hereby required to quit poſſeſſion of the premiſſes which you hold of me, namely, a meſſuage and garden with the appurtenances, [*deſcribing the premiſſes*] ſituate in the pariſh of in the county of now occupied by you or your under-tenant [*as the caſe is*].

Dated this day of 1802.

B. E. [*the landlord*] or *C. F.* agent for *B. E.* legally authorized.

To *C. E.* [*the tenant.*]

A third Form.

SIR,

I hereby give you notice to deliver up poſſeſſion to *G. H.* of the meſſuage or tenement with its appurtenances, which you rent of me, in in the pariſh of in the county of on next.

Dated this day of 1802.

Yours, *&c.*

T. V. [*the landlord.*]

To *B. C.* [*the tenant.*]

Notice to quit Lodgings.

SIR,

I hereby give you notice to quit and deliver up on or before next, the rooms or apartments, and other tenements which you now hold of me in this houſe [*as the caſe is*].

Witneſs my hand, this day of in the year

E. F. [*the landlord.*]

To *E. N.* [*the lodger.*]

Notice to the Tenant either to quit the Premiſſes, or pay double Rent.

SIR,

I Hereby give you notice to quit and yield up, on or before the day of next, poſſeſſion of the meſſuage, with its appurtenances, lands, tenements, and hereditaments which you now hold of me, ſituate at in the pariſh of and county of in failure whereof I ſhall require and inſiſt upon double the value of the ſaid premiſſes, according to the ſtatute in ſuch caſe made and provided. Dated this day of

E. N. [*landlord.*]

To *A. B.* [*tenant.*]

Notice to quit by the Tenant.

SIR,

I Hereby give you notice that on day of I ſhall quit poſſeſſion of the meſſuage or tenement, and premiſſes which I now hold of you, ſituate at in the pariſh of in the county of

Dated this day of 1802.

Yours, &c.

A. B. [*tenant.*]

To *T. E.* [*landlord.*]

Notice by the Tenant to quit Lodgings.

SIR,

THIS is to give you notice that on day of next I ſhall quit and deliver up poſſeſſion of the rooms or apartments and other tenements which I now hold of you in this houſe.

Witneſs my hand, this day of 1802.

N. O. [*the lodger.*]

Notice to Tenant to repair.

SIR,

YOU are hereby required to put in good and tenantable repair, all and ſingular the meſſuage or tenement and premiſſes which you now hold of me, ſituate at, &c. Particularly the ſervant's hall in the ſaid meſſuage or tenement, and the tilting or roof at the northern end thereof [*as the caſe may be*].

Witneſs my hand, this day of

P. L. [*landlord.*]

To *E. N.* [*tenant.*]

Notice to Tenant to pay Rent.

SIR,

THIS is to warn you that unleſs you pay, or cauſe to be paid unto me, on or before the day of next, the the ſum of being a year's rent due

due on the day of for the meſſuage or tenement and premiſſes which you now hold of me, at the yearly rent of ſituated, *&c.* I ſhall claim and inſiſt upon ſuch forfeiture thereof, as I may be by law entitled to.

Witneſs my hand

X. Y. [*landlord.*]

To *I. K.* [*tenant.*]

How to make a Diſtreſs for Rent-arrear, and of the Sale of the ſame.

THE landlord himſelf, or any other perſon, as his bailiff, by an authority from him in writing, may make the diſtreſs. The warrant or authority may be in the following form. "To Mr. A. B., my bailiff, greeting.— "Diſtrain the goods and chattels of C. D. (the tenant), in "the houſe he now dwells in (or on the premiſſes in his "poſſeſſion), ſituate in in the county of for "pounds, being one year's rent, due to me for the "ſame at Chriſtmas day laſt, and for your ſo doing, this "ſhall be your ſufficient warrant and authority. Dated "the day of 1795. "*J. S.*" Written authority to diſtrain.

Being legally authorized to diſtrain, you enter on the premiſſes, and make a ſeizure of the diſtreſs. If it be made in a houſe, ſeize a chair or other piece of furniture, and ſay, "I ſeize this chair, in the name of all the goods in "this houſe, for the ſum of pounds, being one year's "rent, due to me (or to *J. S.* the landlord) at Chriſtmas "day laſt, by virtue of an authority from the ſaid *J. S.* for "that purpoſe (provided you diſtrain as bailiff)." How to make diſtreſs.

Then take an inventory of ſo many goods as you judge will be ſufficient to cover the rent diſtrained for, and alſo the charges of the diſtreſs. Make a copy thereof, as follows:

"An inventory of the ſeveral goods and chattels diſtrained "by me *A. B.* this day of in the year of our "Lord in the houſes, out-houſes, and lands (as the "caſe is) of *C. D.* ſituate in in the county of by "the authority and on the behalf of *J. S.* (provided you "diſtrain as bailiff) for the ſum of pounds, being "one year's rent due to me, or to the ſaid *J. S.* (as the "caſe is) at Chriſtmas day laſt.

"In the dwelling-houſe, two tables, two chairs, *&c.*

"In the barn, ſix hurdles, and ſo on." The inventory.

At the bottom of the inventory, ſubſcribe the following notice to the tenant:

"Mr. *C. D.*

The notice to the tenant.

"Take notice, that I have this day diſtrained (or that as "bailiff to *J. S.* your landlord, I have this day diſtrained) "on the premiſſes above mentioned, the ſeveral goods and "chattels ſpecified in the above inventory, for the ſum "of pounds, being one year's rent due to me (or to "the ſaid *J. S.*) at Chriſtmas day laſt, for the ſaid premiſſes; "and that unleſs you pay the ſaid rent, with the charges of "diſtraining for the ſame, within five days from the date "hereof, the ſaid goods and chattels will be appraiſed and "ſold according to law. Given under my hand, the "day of in the year of our Lord

"*W. T.*"

How ſerved.

A true copy of the above inventory and notice muſt either be given to the tenant himſelf, or left at his houſe, or if there be no houſe, on the moſt notorious place on the premiſſes. And it is proper to have a perſon with you when you make the diſtreſs, and alſo when you ſerve the inventory and notice, to examine the ſame, and to atteſt the regularity of the proceedings.

Of removing the goods.

The goods may be removed immediately, and in the notice the tenant may be acquainted where they are removed; but it is now moſt uſual to put a man into poſſeſſion, and let them remain on the premiſſes till you are entitled by law to ſell them*, which is on the ſixth day incluſive, after the diſtreſs made, *i. e.* goods diſtrained on the Saturday, may be removed and ſold on the Thurſday afternoon following. *Wallace* v. *King* and another, 1 *H. Bl.* 13.

When they may be ſold.

How, if further time required.

If the tenant require further time for the payment of the rent, and the landlord chuſes to allow it, it is beſt to take a memorandum in writing from the tenant; "That he does "conſent that he ſhould continue in poſſeſſion of his goods "and chattels in his houſe, (or upon the premiſſes) for ſuch "a time longer, you having agreed not to ſell them for that "time, and that he will pay the expences of keeping poſ-"ſeſſion." This memorandum prevents the landlord from being deemed a treſpaſſer, which, after the expiration of five days, he otherwiſe would be, and might have an action of treſpaſs brought againſt him for ſtaying longer upon the premiſſes.

Agreement for that purpoſe.

How to ſearch for replevin and proceed to ſale.

If there is no allowance of, or agreement for further time, ſearch at the expiration of the five days at the ſheriff's office to ſee if the goods have been replevied; if not, and the rent and charges ſtill remain unpaid, ſend for a conſta-

* By the common law a diſtreſs was merely a pledge, and could not be ſold but to protect landlords in the recovery of their rent, the ſtatute 2 *W. & M.* 1 *c.* 5. *ſ.* 2. authorizes the ſale of goods diſtrained for rent, after five days from the making of the diſtreſs.

ble

ble* and two ſworn appraiſers, who having viewed the goods, the former muſt adminiſter to the latter the following oath:

Appraiſers oath.

"You, and each of you, ſhall well and truly appraiſe the "goods and chattels mentioned in this inventory (holding "it in his hand), according to the beſt of your judgment. "So help you God."

Then indorſe on the inventory the following

Memorandum thereof.

"Memorandum; that on the day of in the "year of our Lord *A. B.* of, *&c.* and *C. D.* of, *&c.* "two ſworn appraiſers, were ſworn upon the Holy Evan- "geliſts, by me *J. K.* of, *&c.* conſtable, well and truly to "appraiſe the goods and chattels mentioned in this inven- "tory, according to the beſt of their judgment,

"As witneſs my hand,

J. K. Conſtable."

"Preſent at the time "of ſwearing the ſaid "*A. B.* and *C. D.* as "above, and witneſs "thereto,

"*L. M.*

"*O. P.*"

After the appraiſers have valued the goods, continue the indorſement on the inventory as follows:

Appraiſement.

"We, the above named *A. B.* and *C. D.* being ſworn "upon the Holy Evangeliſts, by *J. K.* the conſtable above "named, well and truly to appraiſe the goods and chattels "mentioned in this inventory, according to the beſt of our "judgment; and, having viewed the ſaid goods and chat- "tels, do appraiſe the ſame at the ſum of "pounds. As witneſs our hands the day of "in the year of our Lord

A. B.
C. D. } Sworn Appraiſers."

How diſpoſed of.

When the goods are thus valued, it is uſual for the appraiſers to buy them at their own valuation, and a receipt at the bottom of the inventory, witneſſed by the conſtable, is uſually held a diſcharge. But if the diſtreſs be of conſiderable value, it is much more adviſeable to have a proper bargain and ſale between the landlord, the conſtable, the appraiſer, and the purchaſer.

The goods being diſpoſed of, deduct the rent in arrear, and all reaſonable charges attending the diſtreſs, and return the overplus (if any) to the tenant.

If the produce is not ſufficient to cover the demand, you may diſtrain again.

* It ſhould be a conſtable of the hundred, pariſh or place where ſuch diſtreſs was taken, and not one out of the diſtrict. *Wallace* v. *King*, 1 *H. Blac.* 14.

Form of a Tenant's conſent to the Landlord's continuing in Poſſeſſion upon the Premiſſes, when he requires further Time for Payment.

I *E. T.* do hereby conſent that *A. B.* my landlord, who on the day of diſtrained my goods and chattels for rent due to him, ſhall continue poſſeſſion thereof on the premiſſes for the ſpace of ſeven days from the date hereof, the ſaid *A. B.* undertaking to delay the ſale of the ſaid goods and chattels for that time, in order to enable me to diſcharge the ſaid rent.

Witneſs my hand, this day of 1802

E. T.

Notice to the Sheriff when in Poſſeſſion on an Execution.

IF the ſheriff is in poſſeſſion of the tenant's goods on an execution, the landlord need not make a diſtreſs, but ſhould forthwith ſerve him with the following notice:

To *N. O.* and *E. F.* Eſqrs. Sheriff of Middleſex [*as the caſe may be*].

TAKE notice that the ſum of for one year's [*as the caſe is*] rent due at laſt, is now due from *E N.* the perſon to whom the goods belong of which you are now in poſſeſſion, by virtue of his Majeſty's writ of returnable [*ſtate the writ and return*]:

As witneſs my hand, this day of 1802.

A. B. landlord of the premiſſes.

Note: The man in poſſeſſion of the goods, *&c.* is to be paid 2*s.* 6*d. per diem*, if the tenant keep him; and 3*s.* 6*d.* if he keep himſelf.

Precedents of Pleadings in Replevin.

Writ of replevin.

THE King, *&c.* We command you that juſtly and without delay you cauſe to be replevied the cattle of *B.* which *D.* took and unjuſtly detains, as it is ſaid, and afterwards thereupon cauſe him juſtly to be removed, that we may hear no more clamour thereupon for want of juſtice, *&c.*

Plaint:

A. B. complains againſt *C. D.* in a plea of taking and unjuſtly detaining his cattle againſt ſureties and pledges, *&c.*

Pledges to proſecute, *E. F.* and *G. H.*

Walker

Walker *againſt* Towerſy and others.

M. 9. *W.* 3. *Roll*, 48.

Declaration. Pract. Reg. 157.

Midd', to wit, *JOHN Towerſy*, *Robert Wheeler* and *William Stubbins* were ſummoned to anſwer to *Thomas Walker* in a plea, why they took a ſilver porrenger of the ſaid *Thomas* and unjuſtly detained it, againſt ſurety and pledges, until, *&c.* And whereon the ſame *Thomas* by *J. L.* his attorney complains that the ſaid *John*, *Robert* and *William*, on the firſt day of *May* in the 9th year of the reign of the Lord *William* the Third, now king of *England*, *&c.* in the *Charter-houſe* in the county of *Middleſex* aforeſaid, in a certain place there called the *dwelling-houſe* of him the ſaid *Thomas*, took the ſaid porrenger of him the ſaid *Thomas*, and unjuſtly detained it, againſt ſurety and pledges until, *&c.* whereby the ſame *Thomas* ſays that he is prejudiced, and hath damage to the value of 30*l.* And therefore he produces the ſuit, *&c.*

Cognizance by overſeers for a poor's rate.

And the ſaid *John*, *Robert* and *William*, by *R. H.* their attorney come and defend the force and injury when, *&c.* and well acknowledge the taking of the porrenger aforeſaid in the ſaid place in which, *&c.* and juſtly, *&c.* becauſe they ſay, that at the ſaid time when, *&c.* the ſame *John* and *Robert*, being overſeers of the poor of the pariſh of St. *Sepulchre* in the county of *Middleſex*, by virtue of a certain warrant under the hands and ſeals of *William Withers*, Eſq; and *Thomas Smith*, Eſq; then two of the juſtices of the lord the now king, aſſigned to preſerve the peace in the county aforeſaid (*quorum unus*) to the warden of the church and the overſeers of the poor of the ſame pariſh, or any of them, directed, at the ſaid place in which, *&c.* demanded of the ſaid *T. Walker* to pay them 10*s.* 6*d.* of lawful money upon him duly aſſeſſed towards the relief of the poor of the pariſh aforeſaid, by the authority and according to the tenor, purport and effect of a certain ſtatute made and provided in a parliament of the lady *Elizabeth*, late queen of *England*, &c. held at *Weſtminſter* in the county of *Middleſex* in the 43d year of her reign; and becauſe the ſame *Thomas* then and there refuſed to pay the ſaid 10*s.* 6*d.* to them the ſaid *John* and *Robert*, they the ſame *John* and *Robert*, as overſeers of the poor aforeſaid, and the ſaid *William* at their requeſt and in their aid, for the preſervation of the peace of the ſaid lord the king, (the ſame *William* being then a conſtable within the pariſh aforeſaid) by virtue of the ſtatute and warrant aforeſaid well acknowledge the taking of the porrenger aforeſaid, the ſaid time when, *&c.* in the ſaid place in which, *&c.* in the name of a diſtreſs for the ſaid 10*s.* 6*d.* upon him the ſaid *T. Walker* as aforeſaid aſſeſſed towards the relief of the poor of the pariſh aforeſaid, then being in arrear and unpaid, and juſtly, *&c.* And this they are ready

43 Eliz. c. 2 ſec. 19.

to verify: wherefore they pray judgment, and a return of the porrenger aforeſaid, to be adjudged to them, *&c.*

Repl. *De injuria ſua propria.*

And the ſaid *Thomas* ſays, that the ſaid *John*, *Robert* and *William*, by the reaſon before alledged, the taking of the porrenger aforeſaid of him the ſaid *Thomas* in the ſaid place in which, *&c.* ought not to acknowledge juſt, becauſe he ſays, that the ſaid *John*, *Robert* and *William*, the day and year aforeſaid in the declaration aforeſaid mentioned, of their own wrong, without ſuch cauſe by them in their cogniſance aforeſaid above mentioned, the porrenger aforeſaid of him the ſaid *Thomas* in the ſaid place in which, *&c.* took and unjuſtly detained, againſt ſurety and pledges, *&c.* in manner and form as the ſaid *Thomas* above againſt them complains; and this he prays may be enquired of by the country: and the ſaid *John*, *Robert* and *William* likewiſe, *&c.* Therefore, *&c.*

Hubbard *againſt* Handford.

Declaration. Replevin in K. B.

Midd', to wit. *RICHARD Handford* was ſummoned to anſwer to *Richard Hubbard*, in a plea, why he took the goods and chattels of him the ſaid *Richard Hubbard*, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* And whereon the ſame *Richard Hubbard* by *J. P.* his attorney complains, that the ſaid *Richard Handford* on the 7th day of *October* in the 2d year of the reign of the lord and lady *William* and *Mary*, now king and queen of *England*, *&c.* at the pariſh of St. *Margaret Weſtminſter* in the county aforeſaid, in a certain place there called *Peter-ſtreet*, took the goods and chattels following, to wit, one jack, two ſpits, 18 pewter plates, *&c.* (*reciting ſeveral other particulars*) of the ſaid *Richard Hubbard*, and unjuſtly detained them, againſt ſurety and pledges, until, *&c.* whereby the ſame *Richard Hubbard* ſays, that he is prejudiced, and hath damage to the value of 20*l.* And therefore he produces the ſuit, *&c.*

And the ſaid *Richard Handford* by *J. L.* his attorney comes and defends the force and injury, when, *&c.* and well avows the taking of the goods and chattels aforeſaid, in the ſaid place where, *&c.* and juſtly, *&c.* becauſe he ſays, that the ſame place, where the taking of the goods and chattels aforeſaid is ſuppoſed to be, contains, and at the ſame time when the taking of thoſe goods and chattels is ſuppoſed to be, did contain in itſelf, a certain piece or parcel of land, with the appurtenances, in a place called *Peter-ſtreet*, otherwiſe *Bowling-alley*, in the pariſh of St. *Margaret Weſtminſter* aforeſaid in the county aforeſaid; of which ſaid piece or parcel of land, with the appurtenances, one *Robert Marſham*, knt. before the ſaid time when, *&c.* was ſeiſed in his demeſne as of fee; and being ſo thereof ſeiſed, the ſaid *Robert*, before the ſaid time when, *&c.* to wit, on the

Sir *Robert Marſham* ſeiſed in fee of the place where, *&c.* de-

the 16th day of *May*, in the first year of the reign of the lord and lady the now king and queen, at the parish of St. *Margaret Westminster* aforesaid, in the county aforesaid, demised the same piece or parcel of land, with the appurtenances, to the said *Richard Handford*, to hold to the same *Richard* and his assigns from the feast of the Blessed Virgin *Mary* then last past before the date of the same demise, for the term of 51 years from thence next ensuing and fully to be compleat and ended: by virtue of which said demise the said *R. Handford* was possessed of the same piece or parcel of land for the term aforesaid; and so being thereof possessed, the same *R. Handford* afterwards, and before the said time when, &c. had erected and built the said messuage or tenement on the piece or parcel of land aforesaid, and was thereof possessed; and being so thereof possessed, he the same *Richard Handford*, before the said time when, &c. to wit, on the 20th day of *December*, in the first year of the reign of the said lord and lady the now king and queen abovesaid, demised the messuage aforesaid, with the appurtenances, to the said *Richard Hubbard* from the feast of the birth of our Lord then next following for the term of one whole year from thence next ensuing fully to be compleat and ended; yielding therefore for the same year to the said *Richard Handford*, or his assigns, the rent of 15*l.* of lawful money of *England*, at the four most usual feasts in the year, to wit, the feasts of the annunciation of the Blessed Virgin *Mary*, St. *John* the baptist, St. *Michael* the archangel, and the birth of our Lord, by even and equal portions: by virtue of which said demise the said *Richard Hubbard* into the messuage aforesaid with the appurtenances entered and was thereof possessed, and the same messuage with the appurtenances for the space of three quarters of a year occupied; and because the sum of 11*l.* 5*s.* of the rent aforesaid, after the demise so made for the said three quarters of a year at the feast of St. *Michael* last past, and before the taking of the goods and chattels aforesaid, were to the same *Richard Handford* in arrear and unpaid, the same *Richard Handford* well avows the taking of the goods and chattels aforesaid in the said place, where, &c. and justly, &c. for the said 11*l.* 5*s.* to the same *Richard Handford* in form aforesaid being in arrear, as in the messuage aforesaid, with the appurtenances, to the distress of the said *Richard Handford* in form aforesaid charged and bound: and this he is ready to verify: wherefore he prays judgment, and a return of the goods and chattels aforesaid to be adjudged to him.

mised it to the defendant for 51 years,

who demised it to the plaintiff for a year at 15*l.*

and for three quarters rent arrear distrained.

And the said *R. Hubbard* says, that the said *R. Handford* for the reason before alledged ought not to avow the taking of the goods and chattels aforesaid in the said place, where, &c. just, because he says, that the said 11*l.* 5*s.* of the rent aforesaid at the said time, when, &c. were not in arrear and unpaid to the said *Richard Handford*, nor was any penny thereof

Repl' that the rent was not in arrear.

thereof at the ſaid time, when, &c. in arrear to the ſaid *Richard Handford*, as the ſaid *Richard Handford* in his avowry aforeſaid hath above alledged: and this he prays may be enquired of by the country: and the ſaid *Richard Handford* likewiſe, &c. Therefore the ſheriff is commanded, that he cauſe to come before the lord and lady the king and queen, from the day of the *Holy Trinity* in three weeks, whereſoever, &c. 12, &c. by whom, &c. and who neither, &c. to recogniſe, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid, &c. On which day before the lord and lady the king and queen at *Weſtminſter* come the parties aforeſaid, by their attornies aforeſaid; and the ſheriff hath not returned the writ, nor done any thing therein; therefore, as before, the ſheriff is commanded, that he cauſe to come before the lord and lady the king and queen from the day of St. *Michael* in three weeks, whereſoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid, &c.

Iſſue.

Where the defendant pleads property as to part, and *non cepit* as to the reſidue.

AND the ſaid *R.* by *R. B.* his attorney comes and defends the force and injury when, &c. and as to the taking of ten ſacks of flour, part of the goods and chattels aforeſaid, he the ſaid *R.* ſaith, that the property of thoſe goods and chattels at the ſaid time when, &c. were in the ſaid *R.* and not in the ſaid *T.* as it is above ſuppoſed by the writ aforeſaid; and this he is ready to verify: whereupon, as to the taking and detaining of thoſe goods and chattels the ſaid *R.* prays judgment of the writ aforeſaid, and that it may be quaſhed, &c. And as to the taking of the reſidue of the goods and chattels aforeſaid, he the ſaid *R.* pleads, that he did not take thoſe goods and chattels, the ſaid reſidue, as the ſaid *T.* doth above complain againſt him; and thereof he puts himſelf upon the country; and the ſaid *T.* does likewiſe the ſame.

And the ſaid *T.* as to the ſaid plea of the ſaid *R.* above pleaded to quaſh the writ aforeſaid, ſaith, that his ſaid writ ought not to be quaſhed by reaſon of any thing above alledged, becauſe he ſaith, that the property of the goods and chattels aforeſaid above ſpecified in the ſaid plea, at the time of taking thoſe goods and chattels, was in the ſaid *T.* as he doth above ſuppoſe by his writ aforeſaid; and this he prays may be enquired of by the country; and the ſaid *R.* does likewiſe the ſame: therefore as well to try that iſſue, as the ſaid other iſſue above joined, the ſheriff is commanded, that he cauſe to come here twelve, &c.

Pl. Gen. 602.

Note; *Upon pleading* non cepit *on a Claim of Property, the Defendant ſhall have his Goods again.* Salk. 581.

AND

AND the ſaid *A.* pleads, that the ſaid *C.* by reaſon of any thing above alledged, ought not to avow the taking of the cattle and chattels aforeſaid in the ſaid place wherein, *&c.* to be juſt, (or *ought not to juſtify*) becauſe he ſaith, that after the ſaid *C.* had taken the cattle and chattels in the place aforeſaid, to wit, [*on ſuch a day and year*] at *W.* aforeſaid, he the ſaid *A.* tendered to the ſaid *C.* 6*s.* 8*d.* which were ſufficient amends for the damages done to him in the ſaid place wherein, *&c.* which 6*s.* 8*d.* the ſaid *C.* then and there totally refuſed to accept, and unjuſtly detained the cattle and chattels aforeſaid, againſt ſureties and pledges, *&c.* until, *&c.* as he the ſaid *A.* doth above complain againſt him; and this he is ready to verify: wherefore, inaſmuch as the ſaid *C.* doth above acknowledge the taking of the ſaid cattle and chattels in the ſaid place wherein, *&c.* he the ſaid *A.* prays judgment and his damages, occaſioned by the taking and unjuſtly detaining of the cattle and chattels aforeſaid, to be adjudged to him, *&c.*

A plea in bar to an avowry, that the plaintiff tendered to the defendant ſufficient amends for the damage feaſant.

And the ſaid *C.* protesting, that the 6*s.* 8*d.* were not ſufficient amends for the damages aforeſaid done to the ſaid *C.* in the ſaid place where, *&c.* for plea ſaith, that the ſaid *A.* did not tender to the ſaid *C.* the ſaid 6*s.* 8*d.* for the damage done in the ſaid place where, *&c.* as the ſaid *A.* hath above alledged; and this he is ready to verify; wherefore he prays judgment, and a return of the cattle and chattels aforeſaid, to be adjudged to him, *&c.*

Defendant proteſting, that the 6*s.* 8*d.* tendered was not a ſufficient amends for plea denies the tender.

And the ſaid *A.* as before ſaith, that he did tender to the ſaid *C.* the ſaid 6*s.* 8*d.* for the ſaid damages done him in the the ſaid place where, *&c.* as he hath above alledged; and this he prays may be enquired of by the country.

Plaintiff rejoins, that he did tender the 6*s.* 8*d.* and iſſue. Pl. Gen. 596, 597. 598.

GEORGE, *&c.* To the Sheriff of *Suſſex*, greeting: Whereas *William A.* was ſummoned to be in the court of the lady *Anne*, late queen of *Great Britain*, *&c.* before the late queen herſelf, to anſwer to *Matthew G.* in a plea, why the ſaid *William* on the 9th day of *April* in the 12th year of the reign of the ſaid lady the queen at *Chalvington* in the county aforeſaid, in a certain place there called the *Croſt*, took the cattle, to wit, eight ewes and ſix lambs, of him the ſaid *Matthew*, and them unjuſtly detained, againſt ſurety and pledges, *&c.* And the ſame *William* in the ſame court before the ſaid lady the late queen appearing, for a certain cauſe by him alledged ſaid, that he took the cattle aforeſaid at *Ripe*, otherwiſe *Cocklington* in the county aforeſaid; without that, that he took the cattle aforeſaid at *Chalvington* in the county aforeſaid, as the ſaid *Matthew* by his declaration aforeſaid had above alledged: and this he was ready to verify: wherefore he prayed judgment of the writ aforeſaid, and that the ſaid writ and declaration, *&c.* and to have a return of the cattle aforeſaid; the ſame *William*

An enquiry of the arrear of rent and value of the cattle diſtrained on a nonſuit in a replevin.

3 Leon. 213.

liam, as bailiff of *Robert R.* well acknowledged the taking of the cattle aforeſaid in the ſaid place to be juſt, &c. becauſe he ſaid, that the ſame place, called the *Cony Earths*, contained in itſelf five acres of land with the appurtenances in the ſaid pariſh of *Ripe*, otherwiſe *Cocklington* in the county aforeſaid, of which ſaid five acres of land with the appurtenances the ſame *Robert R.* before the ſaid time when, &c. was ſeiſed in his demeſne as of fee; and being ſo thereof ſeiſed, before the ſaid time when, &c. to wit, on the 18th day of *March* in the 11th year of the reign of the ſaid lady the late queen, at the pariſh of *Semiſton* in the county aforeſaid, the ſaid *Robert R.* demiſed to one *Matthew G.* the younger, the ſaid five acres of land with the appurtenances, by the name of all thoſe two pieces or parcels of paſture, called the *Cony Earths*, with the appurtenances, lying and being in *Ripe*, otherwiſe *Cocklington* aforeſaid; to have and to hold the ſaid five acres of land with the appurtenances whereof, &c. to the ſame *Matthew G.* from the feaſt of the Annunciation of the Bleſſed Virgin *Mary* then next enſuing unto the end and term of one whole year, and ſo from year to year as long as both parties ſhould pleaſe; yielding and paying therefore the yearly rent or ſum of 50*s.* of lawful money of *Great Britain*, at the two moſt uſual feaſts or terms in the year, to wit, on the feaſt of St. *Michael* the Archangel and the Annunciation of the Bleſſed Virgin *Mary*, by even and equal portions to be paid: by virtue of which demiſe the ſame *Matthew G.* the younger, afterwards, and before the ſaid time when, &c. to wit, on the 26th day of *March* in the year laſt aboveſaid, into the ſaid five acres of land with the appurtenances whereof, &c. entered, and was thereof poſſeſſed; and he the ſaid *Matthew G.* the younger being ſo thereof poſſeſſed, and the ſaid *Robert* of the reverſion of the ſaid five acres of land with the appurtenances being ſeiſed in his demeſne as of fee; and becauſe 50*s.* of the rent aforeſaid, for one year ended on the feaſt of the Annunciation of the Bleſſed Virgin *Mary* in the 12th year of the reign of the ſaid late queen, to the ſame *Robert* after that feaſt and at the ſaid time when, &c. were in arrear and unpaid, the ſame *William*, as bailiff of the ſaid *Robert*, well acknowledges the taking of the cattle aforeſaid in the ſaid place in which, &c. as in parcel of the tenements aforeſaid with the appurtenances whereof, &c. to the ſame *Matthew G.* in form aforeſaid demiſed, and juſtly, &c. for the ſaid 50*s.* rent to the ſaid *Robert* in form aforeſaid being in arrear, &c. And this he was ready to verify: wherefore he prayed judgment and a return of the cattle aforeſaid, together with his damages, coſts and charges in this behalf expended, according to the form of the ſtatute in ſuch caſe made and provided, to be adjudged to him, &c. And afterwards the ſaid lady the queen departed this life: and upon this the ſaid *Matthew* prayed leave of our court before us until the morrow of our Holy *Trinity* wherefoever, &c. to plead in bar

Demiſe of the queen.

bar to the cognisance aforesaid; and he had, *&c.* The same day was given to the said *William &c.* On which day came the said *William* into our same court before us at *Westminster*; and the said *Matthew*, although solemnly called, did not come, nor farther prosecute his writ aforesaid; therefore it is considered, that the said *Matthew* take nothing by his writ aforesaid, but be in mercy for his false claim thereof, and that the said *William* do go thereof without day, *&c.* Therefore we command you, that, according to the form of the statute in such case lately made and provided, by the oath of 12 good and lawful men of your county you diligently enquire how much of the yearly rent aforesaid at the said time of the taking and distraining of the goods and chattels aforesaid was in arrear and unpaid, and how much the goods and chattels aforesaid so as aforesaid taken and distrained were worth, according to the true value of the same; and the inquisition which, *&c.* send to us from the day of St. *Michael* in three weeks under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness *T. Parker*, knt.

Nonsuit.

Enquiry.

17 C. 2. c. 7.

The execution of this writ appears in a certain schedule to this inquisition annexed.

An Inquisition and Judgment upon Stat. 17 *C.* 2. *upon a Judgment on a Demurrer for the Avowant, and Writ to enquire of the Monies in Arrear, and of the Value of the Distress and Judgment thereon.*

After the judgment upon the demurrer that the plea in bar to the avowry is insufficient, concluding, *that the plaintiff take nothing by his writ, but be amerced for his false complaint, and that the defendant is dismissed the court*, you go on thus:

AND thereupon they the said *T. A. W.* and *T.* according to the form of the statute in such case made and provided, pray his Majesty's writ to be directed to the sheriff of the county aforesaid, to enquire what monies were in arrear for the rent aforesaid, at the time of the distress made as aforesaid, and the value [or price] of the cattle taken; therefore the sheriff is commanded, that by the oath of twelve good and lawful men of his bailiwick he diligently enquire what sums of money were in arrear for the rent aforesaid at the time of the distress made, and what was the value of the cattle distrained according to the true value thereof; and the inquisition which, *&c.* the sheriff should return, or make appear here in three weeks from the day of St. *Michael*, under the seal, *&c.* and the seals, *&c.* at which day *T. A. W.* and *T.* came here by their said attorney, and the sheriff, (to wit) Sir *R. M.* Knight and Baronet, now returns an inquisition

tion taken before him at the caſtle of *York* in the county aforeſaid, on the 6th day of *Auguſt* laſt paſt, by the oath of twelve good and lawful men, whereby it is found that the ſaid ſums of money in arrear for the rent aforeſaid, to the ſaid *T. L.* at the time of the diſtreſs were 39*l.* and that the cattle diſtrained, according to the true value [or price] thereof, were worth 38*l.* Therefore it is adjudged, that the ſaid *T. A. W.* and *T.* do recover againſt the ſaid *R. P.* the ſaid 38*l.* for the value of the cattle aforeſaid, being part of the rent in arrear as aforeſaid, found by the ſaid inquiſition in the manner aforeſaid, and his damages by reaſon of the premiſes, by this court adjudged to the ſaid *T. A. W.* and *T.* at their requeſt, by the diſcretion of the Juſtices here, for his expences and coſts laid out by them in this ſuit, according to the form of the ſtatute in ſuch caſe made and provided, to 10*l.* which value, expences and coſts, do in the whole amount to 48*l.* *&c.*

1 Saund. 286, 287.

A *return habend* againſt the plaintiff, for default of his pl. a in bar to an avowry. Thel. Brev. 220.

GEORGE the Second, *&c.* greeting; Whereas *A. B.* lately in our court before us at *Weſtminſter*, was ſummoned to anſwer to *C. D.* in an action wherefore he took nine cows, the cattle of him the ſaid *C.* and unjuſtly detained them, againſt ſureties and pledges, *&c.* and the ſaid *A*, appearing in our ſame court before us, for a certain reaſon by him alledged in our ſame court, in his own right, and the right of *S.* his wife, well avowed the taking of the ſaid cattle in the place in which, *&c.* to be juſt, for 9*l.* rent due and in arrear from him the ſaid *C.* to the ſaid *A.* and *S.* for one half year, ending at the feaſt of the Annunciation of the Bleſſed Virgin *Mary* next before, *&c.* [*as in the avowry*] for one meſſuage, *&c.* with the appurtenances in *W.* demiſed upon them by the ſaid *A.* and *S.* to the ſaid *C.* whereupon the ſaid *C.* though ſolemnly called, did not appear, nor doth further proſecute his ſaid writ; wherefore it was conſidered in our ſame court before us, that he and his pledges for proſecuting ſhould be amerced, and that the ſaid *A.* might depart the court thereon without a day, and ſhould have a return of the ſaid cattle: therefore we command you, that without delay you return the ſaid cattle to the ſaid *C.* and you ſhall not deliver them at the complaint of the ſaid *R.* without our writ, which ſhall expreſſly mention the ſaid judgment; and in what manner you execute this writ, you make appear to us in three weeks from the day of St. *Michael*, wherefoever, *&c.* and have you there this writ. Witneſs, *&c.*

A *return habend* upon a judgment againſt the plaintiff, by default. Lilly's Entr. 637.

GEORGE the Second, *&c.* greeting: Whereas *T. E.* lately in our court before us at *Weſtminſter*, was ſummoned to anſwer to *R. B.* in an action wherefore he took ſeven cows, the cattle of him the ſaid *R. B.* and unjuſtly detained them, againſt ſurety and pledges, *&c.* as he alledged; and the ſaid *R.* afterwards made default in our ſaid court before us:

us; wherefore it was conſidered in our ſame court before us, that he and his pledges for proſecuting ſhould be amerced, and that the ſaid *T.* might depart the court without a day, and ſhould have a return of the cattle aforeſaid: therefore we command you, that without delay you return the ſaid cattle to the ſaid *T.* and you ſhall not deliver them at the complaint of the ſaid *R.* without our writ, which ſhall expreſſly mention the ſaid judgment; and in what manner you execute this writ, you ſhall make appear to us in three weeks from the day of St. *Michael*, whereſoever, *&c.* And have you there this writ. Witneſs, *&c.*

Second Deliverance.

K. B.

GEORGE the Second, *&c.* To the ſheriff of *Eſſex* greeting: If *C. D.* ſhall give you ſecurity that he will proſecute his claim, and alſo return the cattle which in our court before us were lately adjudged to *A. B.* through the default of the ſaid *C.* we command you, that if by means of our writ *de retorn' habendo* lately directed to you for that purpoſe, you have made a return of the ſaid cattle to the ſaid *C. D.* then do you cauſe them to be delivered to the ſaid *C. D.* and by ſureties and ſafe pledges compel the ſaid *A.* that he be before us on the octave of St. *Hilary*, whereſoever we ſhall then be in *England*, to anſwer to the ſaid *C.* for taking and unjuſtly detaining the cattle aforeſaid; and have you there the names of the pledges, and this writ. Witneſs, *&c.* Thel. Brev. 303

K. B.

T. F. by *A. B.* his attorney, offers (or *tenders*) himſelf on the 4th day againſt *W. T.* of a plea, (or *in an action*) wherefore he took the cattle of the ſaid *W. T.* and unjuſtly detained them, againſt ſurety and pledges; and he came not, and the plaintiff was there, *&c.* therefore he and his pledges, to wit, *John Doe* and *Richard Roe*, are amerced, *&c.* and the ſaid *T. F.* may depart the court therefrom without a day, *&c.* and may have a return of the cattle aforeſaid, *&c.* and afterwards, (to wit) on the octave of St. *Martin* then next following, before our ſovereign lord the king at *Weſtminſter*, comes the ſaid *W.* by *J. B.* his attorney, and, by virtue of the ſtatute in ſuch caſe made and provided, prays his majeſty's writ of *ſecond deliverance*, *&c.* and it is granted him, *&c.* returnable on the octave of St. *Martin*, whereſoever, *&c.* The ſame day is given to the ſaid *T. F. &c.* The entry of an award of this writ. *Miſericordia.* *Sine die.*

The difference between this writ in the Common Pleas from the former, is no otherwiſe than at the firſt aſteriſk in the firſt writ before, you ſay, which in our court before our Juſtices at *Weſtminſter* were adjudged to *R. D.* through the default of the ſaid *H. I.* *And at the ſecond aſteriſk* Thel. Brev. 303.

you

you ſay, that he be before our Juſtices at *Weſtminſter*, in three weeks from the day of St. *Michael*, to anſwer, &c.

C. B.

A writ of ſecond deliverance after bail taken. Offic. Brev. 348.

GEORGE the Second, &c. To the ſheriff of *Eſſex* greeting: Becauſe *Lewis B.* in our court before our Juſtices at *Weſtminſter*, hath given you ſecurity that he will proſecute his claim, and will alſo make a return of thoſe cattle which in our ſame court were adjudged to *Stephen R.* through the default of the ſaid *L.* if a return thereof be adjudged to him: therefore we command you, that without delay you cauſe a mare which you have taken *in withernam*, of the cattle of the ſaid *L.* to the value of the cattle formerly taken, to be delivered to the ſaid *L*, and compel the ſaid *S.* by ſureties and ſafe pledges, that he be before our Juſtices at *Weſtminſter* on the octave of St. *Hilary*, to anſwer to the ſaid *L.* for taking and unjuſtly detaining the cattle aforeſaid; and have you there the names of the pledges, and this writ. Witneſs Sir *Thomas Reeve*, Knt. the 28th day of *November* in the ninth year of our reign.

The return of a writ of ſecond deliverance.

BY virtue of this writ to me directed, I have cauſed to be delivered to the within-named *L.* his cattle within-mentioned, as I am within commanded to do: the pledges within named are *John Denn* and *Richard Fenn*.

J. D. Eſq. ſheriff.

Capias in Withernam.

GEORGE the Second, &c. To the ſheriff of *Suffolk* greeting: Whereas we lately commanded you by our writ, that whereas *T. B.* gentleman, had been attached by our writ of *ſecond deliverance*, to appear in our court before us, to anſwer to *J. S.* in an action, wherefore he took the cattle of the ſaid *R.* and unjuſtly detained them, againſt ſureties and pledges, and the ſaid *J. S.* in our ſame court made default; wherefore it was conſidered in our ſame court, that the ſaid *T. B.* ſhould depart hence without a day, and that the ſaid *J. S.* and his pledges for proſecuting ſhould be amerced and that the ſaid *T. B.* ſhould have a return of the cattle aforeſaid irreplegiable; and that you without delay ſhould make a return of thoſe cattle to the ſaid *T. B.* to be detained by him irreplegiable; and in what manner you ſhould execute that writ, you ſhould make known to us [*ſuch a return*] whereſoever we ſhould then be in *England*; and you at that day returned to us, that the cattle aforeſaid were eloigned by the ſaid *J. S.* to places unknown to you, ſo that you could not return or deliver thoſe cattle to the ſaid *T. B.* as you was commanded by the ſaid writ; therefore we command you, that you take ſo many cattle of the ſaid *J. S.* to the value of the cattle aforeſaid, before taken by

by the ſaid *J. S. in withernam*, and deliver them to the ſaid *T. B.* to be kept by him irreplegiable, until you can make a return of thoſe cattle before taken, to the ſaid *T. B.* and in what manner you ſhall execute this our mandate, do you make appear to us on the octaves of St. *Hilary*, whereſoever we ſhall then be in *England*; and that you cauſe further to be done therein, what of right, and according to the laws and cuſtoms of this our kingdom of *Great Britain*, we ſhall ſee meet to be done; we alſo command you, that if the ſaid *T. B.* ſhall make you ſecure of proſecuting his claim, and of returning the chattels aforeſaid, if a return thereof ſhould be adjudged, then do you compel the ſaid *J. S.* by ſureties and ſafe pledges, that he before us [*ſuch a return*] whereſoever we ſhall then be in *England*, to anſwer as well to us for the contempt, as to the ſaid *T. B.* for his damage and injury done him in this caſe; and have you there this writ. Witneſs, *&c.*

A capias in withernam, upon a retornum habendo, after an avowry and a *ca. ſa.* againſt the party for the damages.

GEORGE the Second *&c.* To the ſheriff of the city of *G.* greeting: Whereas *V. P.* was lately ſummoned in our Court before us, to anſwer to *E. D.* of a plea [or *in an action*] wherefore he on the 28th day of *April*, [*in ſuch a year*] at the city of *G.* (to wit) in a place there called *P.* had taken the cattle of the ſaid *E.* to wit, twenty ſheep, and impounded and unjuſtly detained them, againſt ſureties and pledges, until, *&c.* (as he declared); and the ſaid *V. P.* appearing in our ſaid Court, for a certain reaſon therein alledged by him, well avowed the taking of the ſaid cattle in the ſaid place where, *&c.* to be juſt, *&c.* for damage feaſant therein; and the ſaid *E. D.* afterwards in our ſame Court made default: wherefore it was conſidered there, that they and their pledges for proſecuting ſhould be amerced, *&c.* and that the ſaid *V.* ſhould be diſmiſſed therefrom without a day; and that he ſhould have a return of the cattle aforeſaid: therefore we lately commanded you, that you ſhould without delay make a return of the cattle aforeſaid to the ſaid *V. P.* and that you ſhould not deliver them at the deſire of *E. D.* without our writ, which ſhould expreſsly mention the judgment aforeſaid; and in what manner you ſhould execute that precept, you ſhould make appear to us [*on the return*] whereſoever we ſhould then be in *England*; we alſo lately commanded you, that according to the ſtatute in ſuch caſe made and provided, you ſhould diligently inquire by the oaths of honeſt and lawful men of your bailiwick, what damages the ſaid *V. P.* hath ſuſtained, as well by reaſon of the premiſſes, as for his expences and coſts laid out by him about his ſuit in that behalf; and that you ſhould return to us at the time aforeſaid, the inquiſition which you ſhould take thereon, under your ſeal and the ſeals of thoſe perſons by whom you ſhould take the inquiſition, together with this writ; and you at that day returned to us, that the ſaid cattle had been eloigned by the ſaid *E. D.* to places unknown to you; for which reaſon you

The declaration.

The avowry.

Default.

Miſericordia. Sine die.

Return of the cattle.

Second deliverance.

Elongata returned by an Inquiſition.

could not return thoſe cattle to the ſaid *V. P.* and you alſo returned a certain inquiſition taken before you in the city of *G.* in the county of the ſaid city, on the 19th day of *April* [*in ſuch a year*] whereby it was found that the ſaid *V.* had ſuſtained damages by reaſon of the premiſſes, beſides his expences and coſts laid out by him about his ſuit in that behalf, to 10*s.* and for his expences and coſts to 2*d.* Therefore it was adjudged, that the ſaid *V. P.* ſhould recover againſt the ſaid *E. D.* his damages aforeſaid found by the inquiſition aforeſaid; and alſo 10*l.* awarded by our Court before us, to the ſaid *V. P.* for his expences and coſts by way of increaſe; which ſaid damages in the whole amounted to 10*l.* 10*s.* 2*d.* and that the ſaid *E. D.* ſhould be amerced; therefore we command you, that you take ſo many cattle of the ſaid *E. D.* in your bailiwick, *in withernam*, and without delay cauſe them to be delivered to the ſaid *E. D.* to be detained by him irreplegiable till he will make a return of the ſaid cattle before taken to the ſaid *V. P.* and in what manner you ſhall execute this our writ, do you make appear to us on the octave of St. *Hilary*, whereſoever we ſhall then be in *England*: we command you alſo, that you take the ſaid *E. D.* if he ſhall be found in your bailiwick, and keep him ſafely, ſo that you have his body before us at the time aforeſaid, whereſoever we ſhall then be in *England*, to ſatisfy the ſaid *V. P.* for the damages aforeſaid; and have you there then this writ. Witneſs, *&c.*

The finding of the jury.

Judgment.

Withernam.

Ca. ſa.

Theſ. Brev. 62.

Precedents in Ejectment.

A Leaſe in Ejectment, where the Premiſſes are not inhabited; to recover the Poſſeſſion.

THIS indenture made the 17th day of *May*, in the 19th year of the reign of our ſovereign Lord *George* the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith *&c.* and in the year of Our Lord 1780, between *John Andrews*, of *&c.* of the one part, and *John Lilly*, of *&c.* of the other part, witneſſeth, that he the ſaid *John Andrews*, for divers good cauſes and conſiderations him thereunto moving, hath demiſed, granted, and to farm letten, and by theſe preſents doth demiſe, grant, and to farm let unto the ſaid *John Lilly*, all that his meſſuage or tenement commonly called or known by the name of, *&c.* ſituate, lying, and being in *ſtreet*, in the pariſh of *&c.* and late in the poſſeſſion of one *Henry Duncomb*; to have and to hold the ſaid meſſuage or tenement, with the appurtenances, from the date of theſe preſents, for and during, and until the full end and term of five years, from thence next enſuing, and fully to be compleat and ended: Provided always, and upon condition, that if the ſaid *John Andrews*, his executors,

cutors or adminiſtrators, ſhall, at any time after the 30th day of this preſent month of *May*, tender to the ſaid *John Lilly*, his executors or adminiſtrators, one ſhilling, then this preſent indenture, and every thing therein contained, ſhall be void, and of none effect; any thing herein contained to the contrary in anywiſe notwithſtanding. In witneſs whereof the ſaid parties to theſe preſents have hereto interchangeably ſet their hands and ſeals the day and year firſt above written.

Sealed and delivered,
being firſt duly ſtamped,
in the preſence of

N. B. This deed requires a ſtamp.

Proceedings on an Action of Treſpaſs in Ejectment, by original, in the King's Bench.

The original writ.

GEORGE the Second, by the grace of God of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth; to the ſheriff of greeting. If *A. B.* ſhall give you ſecurity of proſecuting his claim, then put by gage and ſafe pledges *C. D.* late of gentleman, ſo that he be before us on the morrow of *All Souls*, whereſoever we ſhall then be in *England*, to ſhew wherefore with force and arms he entered into one meſſuage, with the appurtenances, in which *E. F.* eſquire hath demiſed to the aforeſaid *A. B.* for a term which is not yet expired, and ejected him from his ſaid farm, and other enormities to him did, to the great damage of the ſaid *A. B.* and againſt our peace. And have you there the names of the pledges, and this writ. Witneſs ourſelf at *Weſtminſter*, the day of in the year of our reign.

Pledges of proſecution, { *John Doe*, *Richard Roe.*

Sheriff's return.

The within named *C. D.* is attached by pledges. { *John Den*, *Richard Fen.*

The Declaration againſt the caſual Ejector; who gives notice thereupon to the Tenant in poſſeſſion By original in K. B.

Michaelmas Term, the 29th of King *George* the Second.

to wit, *C. D.* late of in the ſaid county, gent. was attached to anſwer *A. B.* of a plea, wherefore with force and arms he entered into one meſſuage, with the appurtenances, in *Sutton* in the county aforeſaid, which *E. F.* Eſq. demiſed to the ſaid *A. B.* for a term which is not expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *A.* and againſt the peace of the lord the king, *&c.*

Declaration.

And whereupon the said *A.* by *G. H.* his attorney, complains, that whereas the said *E. F.* on the day of in the year of the reign of the lord the king that now is, at aforesaid, had demised to the same *A.* the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said *A.* and his assigns, from the feast of then last past, to the end and term of five years from then next following, and fully to be complete and ended, by virtue of which demise the said *A.* entered into the said tenement, with the appurtenances, and was thereof possessed; and the said *A.* being so possessed thereof, the said *C.* afterwards, that is to say, on the said day of in the said year, with force of arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said *E. F.* demised to the said *A.* in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said *A.* out of the said farm, and other wrongs to him did, to the great damage of the said *A.* and against the peace of the said Lord the king: whereby the said *A.* saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings his suit, *&c.*

Any day after the plaintiff's title accrued

Mr. *J. K.*

I Am informed that you are in possession of, or claim title to, the premisses mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear on the first day of next *Hilary* Term, in his Majesty's court of *King's Bench* wheresoever, *&c.* by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me and you will be turned out of possession.

Notice thereto.

Your loving friend,
C. D.

Declaration in Ejectment by Bill.

Middlesex, *ss.* *A. B.* complains of *C. D.* being in the custody of the marshal of the *Marshalsea* of our sovereign lord the king, before the king himself, for that whereas *E. T.* gentleman, on the tenth day of *May*, in the fifth year of the reign of our lord the now king, at *Westminster*, in the county of *Middlesex*, had demised, granted, and to farm let, to the said *A.* five messuages, *&c.* *(reciting the several parcels)* with the appurtenances, situate, lying, and being in the parish of *St. Martin's in the Fields*, in the said county of *Middlesex*, to have and to hold the said tenements, with the appurtenances, to the

the said *A.* and his assigns, from the 25th day of *March* then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended; by virtue of which said demise, he the said *A.* entered into the said tenements, with the appurtenances, and was thereof possessed until the said *C.* afterwards, that is to say, on the same tenth day of *May*, in the sixth year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, which the said *E. T.* demised to the said *A.* in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *A.* out of his said farm; and then and there did other injuries to the said *A.* against the peace of our said lord the king, and to the damage of him the said *A.* of twenty pounds, and thereupon he brings his suit, *&c.*

Pledges to prosecute, { *John Doe*, *Richard Roe.*

The notice to this declaration is the same as the last; only instead of the words "wheresoever, &c." must be substituted "at *Westminster*."

Declaration in Ejectment, by original, on a Double Demise.

Ss. C. D. late of *&c.* yeoman, was attached to answer *K. B.* of a plea wherefore, with force of arms, he entered into one moiety of the manor of otherwise with the appurtenances, and into thirty messuages, ten cottages, four hundred acres of land, two hundred acres of meadow, and two hundred acres of pasture, with the appurtenances, in otherwise in the county of aforesaid, which *E. F.* demised to the said *K.* for a term which is not yet expired; and also into one other moiety of the manor of otherwise with the appurtenances, and into thirty other messuages, ten other cottages, four hundred other acres of land, two hundred other acres of meadow, and two hundred other acres of pasture, with the appurtenances in otherwise aforesaid, in the county of aforesaid, which *F. E.* demised to the said *K.* for a term which is not yet expired; and ejected the said K. from his said several farms, and other wrongs to him did, to the great damage of the said *K.* and against the peace of our sovereign lord the king, *&c.* And thereupon the said *K.* by *G. H.* his attorney, complains, that whereas the said *E. F.* on the day of in the year of his present majesty, at in the county aforesaid, had demised to the said *K.* the said moiety and tenements first above-mentioned, with the appurtenances: to have and to hold the same moiety and tenements, with the appurtenances, to the said *K.* and his assigns, from the day of then last past, to the full end and term of five years from thence next ensuing, and fully to be

complete and ended: by virtue of which demiſe the ſaid *A.* entered into the ſame moiety and tenements, with the appurtenances, and was thereof poſſeſſed: and the ſaid *A.* being ſo poſſeſſed thereof, the ſaid *C.* afterwards, to wit, on the ſaid day of (the firſt day) in the ſaid year, with force and arms, entered into the moiety and tenements firſt above-mentioned, with the appurtenances, which the ſaid *E. F.* demiſed to the ſaid *K.* in manner aforeſaid, for the term aforeſaid, which is not yet expired; and ejected the ſaid *K.* out of the ſaid firſt above-mentioned farm. And alſo that whereas the ſaid *F. E.* on the day of in the year aforeſaid, at aforeſaid, had demiſed to the ſaid *K.* the ſaid moiety and tenements ſecondly above mentioned, with the appurtenances; to have and to hold the ſame moiety and tenements, with the appurtenances, to the ſaid *K.* and his aſſigns, from the day of then laſt paſt, to the full end and term of five years from thence next enſuing, and fully to be compleat and ended; by virtue of which laſt mentioned demiſe, the ſaid *K.* entered into the ſame moiety and tenements, with the appurtenances, and was thereof poſſeſſed: and the ſaid *K.* being ſo poſſeſſed thereof, the ſaid *C.* afterwards, to wit, on the ſaid day of (the firſt day in this count) in the ſaid year, with force and arms, entered into the ſaid moiety and tenements laſtly above-mentioned, with the appurtenances, which the ſaid *F. E.* demiſed to the ſaid *K.* in manner aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid *K.* out of his ſaid laſt-mentioned farm, and other wrongs to him did, to the great damage of the ſaid *K.* and againſt the peace of our ſaid ſovereign lord the king, *&c.* whereupon the ſaid *K.* ſays, he is injured, and has ſuſtained damage to the value of forty pounds; and therefore he brings his ſuit, *&c.*

N. B. The declaration, by *bill*, on a double demiſe, is in *ſubſtance* the ſame as the count part of the declaration by *original*; and the only difference in *form* is that which exiſts between a declaration by *original* and a declaration by *bill*, on a ſingle demiſe. The notice muſt be the ſame as that in page 580.

N. B. Copies of theſe declarations may be had of any law ſtationer.

Affidavit of Service of Declaration, where there is but one Tenant.

In the *King's Bench*,

Between { *R. D.* on demiſe of *C. D.* plaintiff, and *E. F.* - - . defendant.

S. S. of *&c.* maketh oath, and ſaith, that he this deponent did, on the day of laſt, deliver a true copy of the declaration and notice hereunto annexed,

nexed, to *W. T.* tenant in poſſeſſion of the premiſſes in in the ſaid declaration mentioned; and at the ſame time, told him it was a declaration in ejectment, and that unleſs he did appear thereunto, by ſome attorney of this honourable court, on the firſt day of this preſent Term, judgment would be entered againſt the ſaid defendant by default, and the ſaid *W. T.* would be turned out of poſſeſſion; or words to that or the like effect.

Sworn, *&c.* *S. S.*

Similar Affidavit, where there are ſeveral Tenants.

S. S. of *&c.* maketh oath and ſaith, that he this deponent did, on, *&c.* laſt, deliver a true copy of the declaration and notice hereunto annexed, to *W. T.* tenant in poſſeſſion of part of the premiſſes in the ſaid declaration mentioned; and did alſo, on the ſame day, deliver another copy of the ſaid declaration and notice to *D.* the wife of *I. T.* tenant in poſſeſſion of the reſidue of the premiſſes in the ſaid declaration mentioned. And this deponent further ſaith, that he told them *ſeverally* that it was a declaration in ejectment, and that unleſs they did *ſeverally* appear thereto, by ſome attorney of this honourable court, on the firſt day of this preſent Term, judgment would be entered againſt the ſaid defendant by default, and they the ſaid *W. T.* and *I. T.* would be *ſeverally* turned out of poſſeſſion: or words to that or the like effect.

Sworn, *&c.* *S. S.*

Affidavit of Service of Declaration, where the Tenant's Wife refuſed to open the Door.

S. S. of *&c.* maketh oath, and ſaith, that he this deponent, on the day of laſt, went to the meſſuage of *W. T.* ſituate at *&c.* being the meſſuage in queſtion in this cauſe; and that *M.* the wife of the ſaid *W. T.* refuſed to open the door of the ſaid meſſuage, but ſpoke through the wicket of the ſaid door. And this deponent further ſaith, that he did thereupon ſhew to the ſaid *M.* a true copy of the declaration and notice hereunto annexed, and acquainted her with the contents thereof; but that as ſoon as he had ſo done, the ſaid *M.* ſhut the ſaid wicket, and refuſed to take the ſaid declaration or notice. And this deponent further ſaith, that, not being able to deliver the ſame, he affixed the ſaid declaration and notice on the door of the ſaid meſſuage; and that the ſaid *W. T.* on the ſame day acknowledged that he had received the ſame.

Sworn, *&c.* *S. S.*

Affidavit of the Tenant refuſing to defend an Ejector, in order to have the Landlord admitted Defendant.

S. S. of *&c.* maketh oath and ſaith, that he this deponent did, on, *&c.* laſt, by the direction of *R. B.* landlord of the premiſſes in queſtion in this cauſe, apply to *W. T.* the tenant in poſſeſſion of the ſame premiſſes, to know whether he the ſaid *W. T.* would appear and become defendant in this cauſe, or would permit the ſaid *R. B.* to defend his title to the ſaid premiſſes in the name of the ſaid *W. T.*; and this deponent at the ſame time, ſhewed and offered to deliver to the ſaid *W. T.* a note ſigned by the ſaid *R. B.* whereby the ſaid *R. B.* promiſed to defend and keep the ſaid *W. T.* harmleſs, of, from, and againſt all coſts and charges in this cauſe. And this deponent further ſaith, that the ſaid *W. T.* told him, in anſwer, that he would not appear and become defendant in this cauſe, or any ways concern himſelf therein.

Sworn, *&c.* *S. S.*

A. on a demiſe of *F.* againſt *C.*

Rule for judgment.

UNLESS the tenant in poſſeſſion of the premiſſes in queſtion ſhall appear and plead to iſſue on *Tueſday* next after, *&c.* *(time tenant is to appear in)* LET judgment be entered for the plaintiff againſt the now defendant *C.* by default upon the motion of Mr. *D*——

By the Court.

Note. If plaintiff does not move for judgment the ſame term tenant had notice to appear, the court will not grant ſuch rule.

Note. When you move for a rule for judgment you annex the affidavit of ſervice to a copy of the declaration ſtamped, and give it to counſel with 10*s* 6*d* fee to move, [*vide ante p.* 365,] The clerk of the rules files the affidavit and declaration on ſuch motion, therefore keep by you another copy on ſtamp, or if judgment go againſt the caſual ejector for want of tenant's entering into the rule you muſt have an office copy of the declaration from the clerk of the rules in order to enable you to ſign judgment.

The common Rule of Court.

Hilary Term, the twenty-ninth year of King *George* the Second.

Smith v. *Stiles*, for one meſſuage with appurtenances in Sutton, on the demiſe of *John Rogers.*

Berks, to wit. IT is ordered by the court, by the aſſent of both parties, and their attornies, that *George Saunders*, gentleman, may be made defendant in the place of the now defendant *William Stiles*, and ſhall immediately appear to the plaintiff's action, and ſhall receive a declaration in a plea

plea of treſpaſs and ejectment of the tenements in queſtion, and ſhall immediately plead thereto, not guilty: and, upon the trial of the iſſue, ſhall confeſs leaſe, entry, and ouſter, and inſiſt upon his title only. And if, upon trial of the iſſue, the ſaid *George* do not confeſs leaſe, entry, and ouſter, and by reaſon thereof the plaintiff cannot proſecute his writ, then the taxation of coſts upon ſuch *non-proſ.* ſhall ceaſe, and the ſaid *George* ſhall pay ſuch coſts to the plaintiff, as by the court of our lord the king here ſhall be taxed and adjudged for ſuch his default in non-performance of this rule; and judgment ſhall be entered againſt the ſaid *William Stiles*, now the caſual ejector, by default. And it is further ordered, that, if upon trial of the ſaid iſſue a verdict ſhall be given for the defendant, or if the plaintiff ſhall not proſecute his writ, upon any other cauſe than for the not confeſſing leaſe, entry, and ouſter, as aforeſaid, then the leſſor of the plaintiff ſhall pay coſts, if the plaintiff himſelf doth not pay them.

By the Court.

When the proceedings are by *bill*, and not by *original*, the words "*and file common bail*" ſhould be inſerted after the words requiring the tenant's appearance; and the word *bill* ſhould ſtand in the room of the word *writ*, throughout.

The Rule as drawn up in the Common Pleas.

Hilary Term, the fifth of King *George* the Second.

Norfolk. IT is ordered, by the conſent of *R. M.* the plaintiff's attorney, and *J. C.* attorney for *A. B.* who claims a title to the tenements in queſtion, that the ſaid *A. B.* be admitted defendant, and that the ſaid defendant ſhall immediately appear by his ſaid attorney, who ſhall receive a declaration, and plead thereto the general iſſue this Term; and that the ſaid *A.* at the trial thereupon to be had, ſhall appear in his proper perſon, or by his counſel or attorney, and confeſs leaſe, entry, and ouſter, of ſo much of the tenements ſpecified in the plaintiff's declaration, as are in the poſſeſſion of the ſaid defendant, or his tenant, or of any perſon claiming by or under his title thereto, or that, in default thereof, judgment ſhall be entered againſt the ſaid defendant, the caſual ejector; but let all proceedings againſt him be ſtayed until default be made in ſome of the premiſes: and by the like conſent it is further ordered, that if by reaſon of any ſuch default the plaintiff ſhall be nonſuited upon the trial, the defendant ſhall take no advantage thereof, but ſhall pay coſts to the plaintiff, to be taxed by the prothonotary. And it is further ordered, that the leſſor of the plaintiff ſhall be chargeable with payments of coſts to the ſaid defendant, by this court in any manner to be allowed or adjudged.

A. on

A. on the demiſe of *F.* againſt *C.*

K. B.

A notice of the premiſſes the defendant defends for.

SIR,

TAKE notice that I defend a title for a meſſuage and garden, with the appurtenances, ſituate in the pariſh of in the county of now in poſſeſſion of the ſaid I. F. or his under tenant. Dated the day of 1802.

To Mr. *R. R.*
the plaintiff's attorney,
Theſe.

Your's, *&c.*
P. P.
defendant's attorney.

Judgment by nil dicit.

s. T. Jud. 117.

AND the ſaid defendant, by *A. B.* his attorney, comes and defends the force and injury, &c. and hereupon the ſaid plaintiff prays that the ſaid defendant may anſwer to the ſaid declaration; and the ſaid defendant ſays nothing thereto in bar, or to preclude the ſaid plaintiff from his action, but makes default; whereby the ſaid plaintiff remains againſt the ſaid defendant undefended: wherefore it is conſidered, that the ſaid plaintiff do recover againſt the ſaid defendant his poſſeſſion of the ſaid term yet to come, of and in the ſaid tenements, with the appurtenances, and his damages occaſioned by the treſpaſs and ejectment aforeſaid: but becauſe it is unknown what damages the plaintiff hath ſuſtained by reaſon of the treſpaſs and ejectment aforeſaid, the ſheriff is commanded, that, by the oath of twelve honeſt and lawful men of his bailiwick, he diligently inquire what damages the plaintiff hath ſuſtained, as well by reaſon of the ſaid treſpaſs and ejectment, as for his coſts and expences laid out by him about his ſuit in that behalf; and that he cauſe the inquiſition which he ſhall take, &c. to be made apparent to our ſovereign lord the king at *Weſtminſter*, in three weeks from the day of *Saint Michael*, under the ſeal &c. and the ſeals, &c.: the ſame day is given to the ſaid plaintiff. And thereupon the ſaid plaintiff prays his majeſty's writ of poſſeſſion, *&c.* (as hereafter.)—

Judgment by non ſum informatus.

s. T. Jud. 116.

AND the ſaid *C.* by *B. T.* his attorney, comes and defends the force, injury and damages, and whatever elſe he ought to defend, where and when the Court will conſider thereof; and hereupon the ſaid *A.* prays that the ſaid *C.* may make anſwer to his ſaid declaration: upon which the ſaid *E.* ſays, that he is not inſtructed by his client, the ſaid *C.* to give any anſwer to the aboye complaint of the ſaid

A.

A. nor ſays he any thing in bar, or to preclude the ſaid *A.* from his ſaid action; whereby the ſaid *A.* remains againſt the ſaid *C.* undefended therein: for which reaſon it is conſidered, that the ſaid *A.* do recover againſt the ſaid *C.* his poſſeſſion of the ſaid term yet to come, of and in the ſaid tenements, with the appurtenances, and his damages occaſioned by the ſaid treſpaſs and ejectment: but becauſe it is unknown what damages the ſaid *A.* hath ſuſtained by reaſon of the ſaid treſpaſs and ejectment, the ſheriff is commanded, that he diligently inquire, by the oaths of twelve honeſt and lawful men of his bailiwick, what damages the ſaid *A.* hath ſuſtained, as well by reaſon of the ſaid treſpaſs and ejectment, as for his expences and coſts laid out by him about his ſuit in that behalf; and that the ſheriff cauſe the inquiſition which he ſhall take thereon to be before our ſovereign lord the king [if by original, on a general return day; if by bill, on a day *certain*], under his ſeal, and the ſeals of thoſe by whoſe oaths he ſhall take ſuch inquiſition: the ſame day is given to the ſaid *A.* to be here, before our ſovereign lord the king. And thereupon the ſaid *A.* prays a writ of our ſaid ſovereign lord the king, to be directed to the ſheriff of the ſaid county, to cauſe him to have the poſſeſſion of his ſaid term of and in the ſaid tenements, with the appurtenances, yet to come; and it is granted to him, returnable here at the time aforeſaid, *&c.*

A Judgment by non ſum informatus, *with a* remittitur damna.

AND the ſaid *Matthew Dimmock*, by *John Lilly* his attorney, comes and defends the force, injury, and damages, and whatever elſe he ought to defend, where and when the Court will conſider thereof: and hereupon the ſaid *James Hicks* prays, that the ſaid *Matthew* may make anſwer to his ſaid declaration; upon which the ſaid attorney, for the ſaid *Matthew*, ſaith, he is not inſtructed by the ſaid *Matthew* his client to give any anſwer to the ſaid complaint of the ſaid *James*, nor ſays any thing in bar, or to preclude the ſaid *James* from his ſaid action, whereby the ſaid *James* remains againſt the ſaid *Matthew* undefended therein: therefore it is conſidered, that the ſaid *James* do recover his ſaid term of and in the ſaid tenements, with the appurtenances, againſt the ſaid *Matthew*, and his damages occaſioned by the ſaid treſpaſs and ejectment, to be awarded to him, *&c.* And the ſaid *James*, of his own accord, remits and releaſes to the ſaid *Matthew* all ſuch damages ſo awarded to him; therefore the ſaid *Matthew* is acquitted of all ſuch damages. And the ſaid *James* prays a writ of our ſaid ſovereign lord the king, to be directed to the ſheriff of the ſaid county, to cauſe him to have the poſſeſſion of his ſaid term yet unexpired, of and in the ſaid tenements, with the appurtenances; and it is granted to him, returnable before our ſaid ſovereign lord the

the king [if by bill, on a day *certain*; if by original, on a *general* return day, wherefoever he ſhall then be in *England*]: the ſame day is given to the ſaid *James* to be here, *&c.*

Judgment by relictâ verificatione.

2. T. Jud. 120. AT which came here the parties aforeſaid, *&c.* And hereupon the defendant doth relinquiſh his averment aforeſaid, *&c.* (as in other actions); nor but that he is guilty of the treſpaſs and ejectment aforeſaid, as the ſaid plaintiff hath above complained againſt him; therefore it is conſidered, that the ſaid plaintiff do recover againſt the ſaid defendant his term aforeſaid, of and in the tenements aforeſaid; and his damages occaſioned by the treſpaſs and ejectment aforeſaid: but becauſe it is unknown what damages, *&c.* under the ſeal, *&c.* and the ſeals, *&c.*

Judgment for the Plaintiff for Part.

2. T. Jud. 119, 120. THEREFORE it is conſidered, that the ſaid plaintiff do recover againſt the ſaid defendant his term aforeſaid, of and in the ſaid two hundred and ſixty acres of wood, with the appurtenances; foraſmuch as the ſaid defendant is, by the jurors aforeſaid, above found to be guilty of the treſpaſs and ejectment aforeſaid; and his damages aforeſaid, aſſeſſed by the ſaid jurors to forty-one ſhillings, *&c.* and alſo ſix ſhillings, awarded by this court to the ſaid plaintiff at his requeſt, *&c.* which ſaid damages in the whole amount to eight pounds twelve ſhillings; and be the ſaid defendant taken, *&c.* And be the ſaid plaintiff amerced for his falſe complaint againſt the ſaid defendant, for the reſidue of the treſpaſs and ejectment aforeſaid, whereof the ſaid defendant is above acquitted by the jurors aforeſaid; and the ſaid defendant may go hence thereof for ever diſmiſſed, *&c.* And hereupon the ſaid plaintiff prayeth a writ of our ſovereign lord the now king, to be directed to the ſheriff of the county, to cauſe him to have his poſſeſſion of his term aforeſaid yet unexpired, of and in the ſaid two hundred and ſixty acres of wood, with the appurtenances, and it is granted to him, returnable here in eight days of *Saint Hilary*, *&c.*

Similar Judgment; with a remittitur damna.

AFTERWARDS the proceſs being continued between the parties aforeſaid, in the ſaid action, the jurors were therefore reſpited between them here until this day, that is to ſay, in fifteen days from the Feaſt of *Eaſter*, in the ſixth year of the reign of our ſovereign lord the king; unleſs, *&c.* And now, *&c.* afterwards, *&c.* And hereupon the ſaid *P.* here in court, freely remits to the ſaid *R. R.* and *A.* the ſaid ſixpence for the damages aforeſaid, aſſeſſed by the ſaid jurors in the manner aforeſaid; and alſo the increaſe of the

ſame

ſame to be awarded to him; therefore it is conſidered that the ſaid *P.* do recover againſt the ſaid *R.* *R.* and *A.* his term aforeſaid, of and in the tenements aforeſaid, with the appurtenances, yet unexpired; foraſmuch *&c. as before.*

Judgment againſt ſeveral defendants, of ſeveral parcels of land, and ſeveral damages found, and coſts againſt all.

AT which day the jurors, *&c.* Afterwards, *&c.* Therefore it is conſidered that the ſaid plaintiff do recover againſt the ſaid *T.* *B.* his term aforeſaid, yet unexpired, of and in one meſſuage, eight acres of meadow and ſeven acres of paſture, with the appurtenances (wherein the ſaid defendants are by the ſaid jurors above found to be guilty of the treſpaſs and ejectment aforeſaid); and his damages occaſioned by that treſpaſs and ejectment, done to the ſaid plaintiff by the ſaid *T.* in the manner aforeſaid; beſides his coſts and charges aforeſaid, aſſeſſed by the jurors aforeſaid to two pence in the manner aforeſaid: and againſt the ſaid *I.* his term aforeſaid, yet unexpired, of and in the ſaid one cottage, with the appurtenances (wherein the ſaid *I.* is by the ſaid jurors above found to be guilty of the treſpaſs and ejectment aforeſaid); and his damages occaſioned by that treſpaſs and ejectment done to the ſaid plaintiff, by the ſaid *I.* in the manner aforeſaid; beſides his coſts and charges aforeſaid, aſſeſſed by the jurors aforeſaid to twopence in the manner aforeſaid: [and ſo againſt the reſt of the defendants, where there are ſeveral ejectors.] And it is alſo conſidered that the ſaid plaintiff do recover againſt the ſaid *T.* and *I.* his damages, coſts and charges by him, *&c.* likewiſe aſſeſſed to the ſaid forty ſhillings, in the manner aforeſaid; and alſo eight pounds adjudged to the ſaid plaintiff at his requeſt for his coſts, *&c.* which ſaid damages, coſts and charges, beſides the ſeveral damages aforeſaid, in the whole amount to ten pounds. And that the ſaid *T.* and *I.* be taken, *&c.* And be the ſaid plaintiff amerced for his falſe plaint againſt the ſaid *T.* and *I.* of the reſidue of the treſpaſs and ejectment aforeſaid, whereof the ſaid *T.* *&c.* are by the jurors aforeſaid above acquitted, and the ſaid *T.* and *I.* *&c.* may depart the court here, therefrom for ever diſmiſſed. And hereupon the ſaid plaintiff prayeth a writ of our ſovereign lord the king, to be directed to the ſheriff, *&c.*

2. T. Jud. 120. 122. Jud. 76.

Judgment where one of the defendants was found not guilty, as to part; and the others not guilty as to all.

BE the ſaid *I.* taken, *&c.* And be the ſaid plaintiff amerced for his falſe complaint againſt the ſaid *T.* for the reſidue of the treſpaſs and ejectment aforeſaid, and againſt *C.* and *R.* of the whole treſpaſs and ejectment aforeſaid, whereof the ſaid *T.* *C.* and *R.* are by the ſaid jurors wholly acquitted, and the ſaid *T.* *C.* and *R.* may go hence thereof for ever diſmiſſed, *&c.* And hereupon, *&c.*

2. T. Jud. 23. Jud. 82.

Judgment

Judgment for the Plaintiff, where the Term is expired.

AT which day the jurors, *&c.* Afterwards, *&c.* And becauſe the juſtices here will adviſe themſelves [and ſo continue it till the Term of which judgment is entered.] At which day came here, as well the ſaid *R.* as the ſaid *L.* by their attornies aforeſaid, and hereupon the premiſſes being ſeen, and by the juſtices here fully underſtood; for that it ſufficiently appeareth to this court here, that the ſaid term of three years is fully paſt, it is conſidered that the ſaid *R.* do recover againſt the ſaid *L.* his damages aforeſaid, aſſeſſed by the ſaid jurors to forty ſhillings, *&c.* and alſo, *&c.* which ſaid damages in the whole amount to ſeven pounds; and be the ſaid *L.* taken, *&c.*

2. T. Jud. 227. Jud 82.

Writ of habere facias poſſeſſionem; *with a* fieri facias *for the Coſts.*

GEORGE the Third, by the grace of *God*, of *Great Britian*, *France*, and *Ireland*, King, defender of the faith, *&c.* To the ſheriff of *Oxford*, greeting: Whereas *Richard Z.* lately in our court before us at *Weſtminſter*, by our writ, [if by original; if by bill, then by bill without our writ, and by the judgment of the ſame court,] recovered againſt *T. B.* late of *London*, yeoman, his term, yet unexpired, of and in ſix meſſuages, *&c.* [the premiſſes recovered] with the appurtenances, in the pariſh of *Stanton Harcourt*, in your county; and alſo of and in the rectory of *Stanton Harcourt*, with the appurtenances, in your county, which one *W. M.* on the ſeventh day of *April*, in the ſecond year of our reign, demiſed to the ſaid *Richard* for a term of years which is not yet expired, that is to ſay, from the firſt day of the ſame month of *April*, to the full end and term of ten years then next following, and fully to be complete and ended; by virtue of which ſaid demiſe the ſaid *Richard* entered into the ſaid rectory and tenements, with the appurtenances, and was thereof poſſeſſed, until the ſaid *Thomas* afterwards, that is to ſay, on the ſame ſeventh day of *April*, in the ſaid ſecond year of our reign, with force and arms entered into the ſaid rectory and tenements, with the appurtenances, in and upon the poſſeſſion of the ſaid *Richard*, thereof, and ejected, drove out, and removed the ſaid *Richard* from his ſaid farm, the ſaid term then and yet being unexpired, and did and ſtill doth withhold the poſſeſſion of the ſame from the ſaid *Richard*; whereof the ſaid *Thomas* is convicted, as appears to us of record: and foraſmuch as it is adjudged in our ſame court before us, that the ſaid *Richard* have execution upon his ſaid judgment againſt the ſaid *Thomas*, according to the force, form, and effect of the ſaid recovery; therefore we command you, that without delay you cauſe the ſaid *Richard* to have his poſſeſſion

poſſeſſion of his ſaid term, yet unexpired, of and in the ſaid rectory and tenements, with the appurtenances: and in what manner you ſhall have executed this precept do you make appear to us, in three weeks from the day of *Saint Martin*, wherever we ſhall then be in *England*. We likewiſe command you, that you cauſe to be made ten pounds and ſix pence of the goods and chattels of the ſaid *T.* in your bailiwick, which were awarded to the ſaid *R.* in our ſame court for his damages which he ſuſtained by reaſon of the ſaid treſpaſs and ejectment; and have you thoſe monies before us at the ſame time, wherever we ſhall then be in *England*, to render to the ſaid *R.* for his damages aforeſaid, whereof the ſaid *T.* is convicted; and have there this writ. Witneſs *William* earl *Mansfield* at *Weſtminſter*, the twenty-third day of *October*, in the ſixth year of our reign.

Writ of Poſſeſſion on a Judgment by Bill in the Court of King's Bench; *with a* ca' ſa' *for the Damages.*

TO the ſheriff of *Suffolk*, greeting: Whereas *A. F.* eſquire, lately in our court before us, by bill without our writ, and by the judgment of the ſame court, recovered againſt *R. H.* gentleman, his term, yet unexpired, of and in a meſſuage or tenement called *B.* with the appurtenances, in *S.* in your county, and alſo two hundred acres of land, with the appurtenances, in *S.* aforeſaid, which *I. T.* and *W. P.* on the ſixth day of *September*, in the fourth year of our reign, demiſed to the ſaid *A.* for a term of years which is not yet paſt; that is to ſay, from the Feaſt of *Saint Michael* the Archangel, in the ſaid fourth year of our reign, to the full end and term of five years, from thence next enſuing, and fully to be complete and ended; he the ſaid *R.* afterwards, that is to ſay, on the twenty-eighth day of *October*, in the fifth year of our reign, entered, with force and arms, into the meſſuage and tenements aforeſaid, with the appurtenances, and expelled and ejected the ſaid *A.* therefrom: therefore we command you, that, without delay, you cauſe the ſaid *A.* to have his poſſeſſion, yet unexpired, of and in the meſſuage or tenement above ſpecified; and in what manner you ſhall execute this our writ, do you make appear to us at *Weſtminſter*, on *Wedneſday* next after the morrow of *Saint Martin*. We likewiſe command you, that you take the ſaid *R. H.* if he be found in your bailiwick, and ſafely keep him, ſo that you have his body before us, at *Weſtminſter*, at the day aforeſaid, to make ſatisfaction to the ſaid *A.* for five pounds ten ſhillings, for his damages which he has ſuſtained, as well by reaſon of the treſpaſs and ejectment aforeſaid, as for his expences laid out by him about his ſuit in this cauſe; whereof the ſaid *R.* is convicted, as it appears to us on record; and have there this writ. Witneſs, *&c.*

Note.

Note: This writ muſt be ingroſſed on parchment. Make a *precipe* for the office thus.

Middx. to wit. WRit of poſſeſſion for *A. B.* on the demiſe of *E.* againſt *C. D.* for a meſſuage, with the appurtenances, ſituate at *Weſtminſter*, in the county of *Middleſex*.

Returnable [*the return.*]

R. R. attorney.

Note: Carry *the writ* and *precipe* to the officer who ſigns the writs in this court; pay him for ſigning the ſame 1*s.* 8*d.* ſealing at the ſeal office 7*d.* the ſheriff's warrant thereon 2*s.* 4*d.* his fees for executing the ſame is 1*s.* in the pound, in the yearly value of the premiſſes, if the ſame does not exceed 100*l.* *per annum*, and 6*d.* in the pound for every 20*s.* above, and 2*s.* returning the writ. Officer's fee executing writ uſually 1*l.* 1*s.*

If the proceedings are by *original*, the writ of *poſſeſſion* differs only from the above in the introductory part, and in the return. It is ſigned by the ſheriff, and ſealed as the above writ.

Aſſignment of Error in the King's Bench *in a Judgment of Ejectment in the* Common Pleas.

AFTERWARDS, that is to ſay, *Wedneſday* next after five weeks from the Feaſt of *Eaſter* in this ſaid Term, the ſaid *James Chapman Fuller*, by *Joſeph Sherwood*, his attorney, appears before our ſovereign lord the King, at *Weſtminſter*, and pleads, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error in this reſpect; that is to ſay, that it appears by the record aforeſaid, that the ſaid judgment given in the manner aforeſaid, was given for the ſaid *R. H.* againſt the ſaid *I. C. F.* whereas by the law of this kingdom of *Great Britain* the ſaid judgment ought to have been given for the ſaid *I. C. F.* againſt the ſaid *R.* and therefore it is manifeſtly erroneous in this reſpect; and the ſaid *I. C. F.* prays a writ of our ſovereign lord the king, to ſummon the ſaid *R.* to be before our ſaid ſovereign lord the king, to hear the record and proceedings aforeſaid; and it is granted to him, &c. By which the ſheriff is commanded, that by honeſt, &c. he make known to the ſaid *Robert*, that he be before our ſaid ſovereign lord the king, on the morrow of the *Holy Trinity*, whereſoever, &c. to hear the record and proceedings aforeſaid; and further, &c. The ſame day is given to the ſaid *I. C. F.* &c. At which day the ſaid *I. C. F.* by his attorney aforeſaid, appears before our ſovereign lord the king, &c. and the ſheriff returned not the writ thereupon. And the ſaid *R.* at the ſame day, by *Nathan Hinkman*, his attorney, likewiſe comes here into this court *gratis*; whereupon the ſaid *I. C. F.* pleads, that

Prayer of ſci. fa. ad audiendum errores. Sci. fa. accordingly

Vic non miſit breve

that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error, alledging the error aforeſaid by him before alledged in the manner aforeſaid; and prays that the judgment aforeſaid, for that and other errors in the record and proceedings aforeſaid; may be reverſed, annulled, and rendered altogether ineffectual, and that he may be reſtored to all things which he hath been deprived of, by reaſon of the judgment aforeſaid; and that the ſaid *Robert* may join to the errors aforeſaid; and that the court of our ſaid ſovereign lord the king may now here proceed to an examination, as well of the record and proceedings aforeſaid, as of the matters above aſſigned for error as aforeſaid. And thereupon the ſaid *Robert* doth aver, that neither in the record and proceedings aforeſaid, nor in giving the judgment aforeſaid, is there any error whatſoever. And he likewiſe prays, that the court of our ſaid ſovereign lord the king may now here proceed to an examination, as well of the record and proceedings aforeſaid, as alſo of the matters aforeſaid above aſſigned for error as aforeſaid; and that the ſaid judgment may be in all things affirmed, &c. Joinder in error.

Declaration by Original for the meſne Profits.

Worceſterſhire, ſſ. JOHN DURHAM, late of *Willerſey*, in the county of *Glouceſter*, yeoman, was attached to anſwer *Robert Underwood*, of a plea wherefore, with force and arms, he broke and entered three meſſuages, five hundred acres of land, two hundred acres of meadow, and two hundred acres of paſture, with the appurtenances, in *Treddington*, in the county of *Worceſter* aforeſaid, and expelled, put out, and removed, the ſaid *Robert Underwood* from the poſſeſſion and occupation of his ſaid tenements, and kept and continued the ſaid *Robert Underwood* ſo expelled, put out, and removed, from the poſſeſſion and occupation of the ſame for a long ſpace of time; and, during all that time, had and received, to his own uſe, all the rents, iſſues, and profits of the ſaid tenements, being of the yearly value of two hundred pounds; and other injuries to the ſaid *Robert Underwood* there did, to the great damage of the ſaid *Robert Underwood*, and againſt the peace of our ſovereign lord the king, his crown and dignity: and hereupon the ſaid *Robert Underwood*, by *Giles Taylor* his attorney, complains that the ſaid *John Durham*, on the firſt day of *June*, in the fifth year of the reign of his preſent majeſty, with force and arms, broke and entered the ſaid three meſſuages, five hundred acres of land, two hundred acres of meadow, and two hundred acres of paſture, with the appurtenances, in *Treddington* aforeſaid, in the ſaid county of *Worceſter*, and expelled, put out, and removed the ſaid *Robert Underwood* from the poſſeſſion and occupation of his ſaid tenements, and kept and continued the ſaid *Robert Underwood* ſo expelled, put out, and removed, from the poſſeſſion and occupation of the ſame, Lil. Entr. 192.

for a long ſpace of time; that is to ſay, from the ſaid firſt day of *June*, in the tenth year aforeſaid, until the day of ſuing out the original writ of the ſaid *Robert Underwood*; and, during all that time, had and received, to his own uſe, all the rents, iſſues, and profits, of the ſaid tenements, being of the yearly value of two hundred pounds; and other injuries to the ſaid *Robert Underwood* then and there did, to the great damage of the ſaid *Robert Underwood*, and againſt the peace of our ſaid ſovereign lord the king, his crown and dignity: wherefore the ſaid *Robert Underwood* ſays that he is injured, and hath ſuſtained damage to the value of fifty pounds; and therefore he brings his ſuit, *&c.*

Declaration, by Bill, for the meſne Profits and Coſts in Ejectment, after Judgment by Default againſt the caſual Ejector.

Middleſex, ſſ. *ROBERT THORNE* complains of *David Goodman*, being in the cuſtody of the marſhal of the *Marſhalſea* of our ſovereign lord the king, before the king himſelf, for that the ſaid *David*, on the twenty-ſixth day of *March*, in the eleventh year of the reign of his preſent majeſty [the day on which the ejectment was laid] with force and arms, broke and entered one ſhop, one parlour, and one cellar, part and parcel of a certain meſſuage or dwelling houſe, with the appurtenances, of him the ſaid *Robert*, in the pariſh of, *&c.* in the ſaid county of *Middleſex*, and then and there expelled, put out, and removed the ſaid *Robert* from the poſſeſſion and occupation thereof; and kept and continued the ſaid *Robert* ſo expelled, put out, and removed, from the poſſeſſion and occupation thereof for a long ſpace of time; to wit, from thence for the ſpace of nine months then next following; and, during all that time, had and received, to his own uſe, all the rents, iſſues, and profits of the ſaid ſeveral premiſſes, being of a large yearly value; to wit, of the yearly value of ſixteen pounds: by reaſon whereof the ſaid *Robert* was forced and obliged to lay out and expend, and did lay out and expend, a large ſum of money, to wit, the ſum of twenty pounds, in and about recovering poſſeſſion of his ſaid ſhop, parlour, and cellar, with the appurtenances, to wit, at the pariſh aforeſaid; and the ſaid *David* then and there did other wrongs to the ſaid *Robert*, againſt the peace of our ſaid ſovereign lord the king, and to the ſaid *Robert* his damage of forty pounds; and therefore he brings his ſuit, &c.

Pledges to proſecute, { *John Doe*, *Richard Roe*.

Pleas thereto: viz. 1. *Not guilty; and* 2, *Not guilty within ſix years.*

AND the ſaid *David*, by *John Brown* his attorney, comes and defends the force and injury when, *&c.* and ſays, that he is not guilty of the treſpaſs above laid to

his charge, in manner and form as the ſaid *Robert* hath above thereof complained againſt him; and of this he puts himſelf upon the country, and the ſaid *David* doth the like. And for a further plea in this behalf, the ſaid *David*, by leave of the court here, for this purpoſe firſt had and obtained, according to the form of the ſtatute in ſuch caſe made and provided, ſays, that the ſaid *Robert* ought not to have his aforeſaid action thereof againſt him; becauſe he ſays that he was not guilty of the treſpaſs aforeſaid, above laid to his charge, at any time within ſix years next before the day of exhibiting the bill of the ſaid *Robert* againſt the ſaid *David*, in the manner and form as the ſaid *Robert* hath above thereof complained againſt him the ſaid *David*: and this he the ſaid *David* is ready to verify; wherefore he prays judgment if the ſaid *Robert* ought to have his aforeſaid action thereof, againſt him, *&c.*

C. Runnington.

Replication and Iſſue.

AND the ſaid *Robert*, as to the ſaid plea of the ſaid *David*, by him laſtly above pleaded in bar, ſays, that he, by reaſon of any thing by the ſaid *David* in that plea alledged, ought not to be barred from having his aforeſaid action thereof againſt him; becauſe he ſaith that the ſaid *David* was guilty of the treſpaſs aforeſaid, above laid to his charge, within four years next before the day of exhibiting the bill of the ſaid *Robert* againſt the ſaid *David*, in manner and form as he the ſaid *Robert* hath thereof complained againſt him the ſaid *David*: and this he the ſaid *Robert* prays may be enquired of by the country; and the ſaid *David* doth the like, *&c.*

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Or an intereſt jointly with his wife. 82, 163
Or her moiety, where ſhe is joint-tenant with another. 272
So, he may grant an eſtate in right of his wife, upon condition. 82
Such grant ſhall be a diſpoſition, in what caſe. 269
His neglect to perform a condition annexed to her eſtate, loſes it for ever. 273
Except it be a condition in law. *ibid.*
He may diſpoſe of part of her intereſt. 82
He may make a leaſe to commence after her death. 83, 269
So, a leaſe of a copyhold with licence, cannot be avoided by her after his death, though ſhe be entitled to her freebench. 100
But a forfeiture by him endures only while his life continues. 85
So, his demiſe of a copyhold in right of his wife contrary to the cuſtom, will not deſtroy the cuſtom. 101
He cannot diſpoſe of the poſſibility of a term. 83
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The marriage does not determine the wife's leaſe at will. 272
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He may diſtrain for arrears of rent after his wife's death. 287

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But only a writing atteſting the ſame, and the wife's affirmation. *ibid.*
He may ſurrender an eſtate in right of his wife alone or with her. 152
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Where a bond is for the performance of covenants in a leaſe, if the leſſee aſſign the leaſe, he may alſo aſſign the bond. 257
But this muſt be before any covenant be broken. *ibid*
If the leſſee bind himſelf in a ſum to perform the covenants of a leaſe, it does not alter the place of payment. 247
Though a bond with a penalty be diſcharged by the tenant taking the benefit of an inſolvent act, yet if there be a deed of covenant alſo, he is ſtill liable on any future breach of covenant. 277
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All bonds or covenants tending to fruſtrate the proviſions of the ſtats. 13 & 18. *Eliz.* ſhall be void. *ibid*
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A Naction on the caſe lies for conſequential damages where the act is not an injury. 520

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Chattel.

Leaſes for years, of any duration, are conſidered only as chattels, and caſt upon the executor. 4
An eſtate of a thouſand years, therefore, is only a chattel, and reckoned part of the perſonal eſtate. 130
But lands are often conveyed in the nature of a leaſe for a long term, for a particular purpoſe, in family ſettlements, and ſuch are not accounted leaſes, but terms to attend the inheritance. *ibid.*
Such terms may be entailed. *ibid.*
But a chattel properly cannot be entailed. *ibid.*
The huſband has an abſolute power over the chattels real and perſonal of which he is poſſeſſed in right of his wife. 82, 273
But if he does not diſpoſe of a chattel of his wife, if ſhe ſurvive him ſhe ſhall have it again. *Page* 83
As chattels go to the executor or adminiſtrator of the party deceaſed and not to his heir, the executor or adminiſtrator has the ſame intereſt in them as the teſtator or inteſtate had. 179, 278, 279
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The tenant's attorney muſt deliver a note in writing to the plaintiff's attorney, ſtating the quantity for which the tenant defends, in what caſe. *ibid.*
Notwithſtanding that the defendant has entered into the conſent rule, the leſſor muſt prove the defendant to be in poſſeſſion, if the defendant conteſt his poſſeſſion. 373
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Who are entitled to the emblements, and who are not. *ibid.*
The executor, *&c.* of tenant in fee, in tail, or dower, who die after ſowing and before ſeverance ſhall have the emblements. *ibid.*
He who ſows the corn, generally, ſhall have it. *ibid.*
Therefore, if the leſſor ſow, and then let for life, and his leſſee die, ſuch leſſee's executor ſhall not have the emblements, but he in reverſion. *ibid.*
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If a parſon ſow his glebe and dies, his executors ſhall have the emblements. *ibid.*
The parſon may bequeath them. *ibid.*
One who has not an intereſt ſhall not have the emblements. *ibid.*
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Frauds, ſtatute of, &c.

By the ſtatute of frauds (29. *Car.* 2. *c.* 3.) no leaſes, eſtates, &c. either of freehold or term of years ſhall be aſſigned, granted, &c. unleſs by deed or note in writing ſigned by the aſſignor, &c. or their agent. 16, 79, 148
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Therefore the deſtruction of that ſeems to deſtroy the leaſe, for it deſtroys all evidence of it. *ibid.*
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By the ſame ſtatute, no parol leaſe for above three years is to have any other effect than a leaſe at will. 163
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But any leaſe that does not exceed three years from the making is within it. *ibid.*
Where an executory contract is by which no term for above two years ever ſubſiſts at the ſame time, it is not void by the ſtatute. 19
Though a leaſe be void by the ſtatute, as to the duration of the term, the tenant holds under the terms of it in other reſpects. *ibid.*
A parol agreement part performed is not within the proviſions of the ſtatute, but will be decreed by a court of equity. 23
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Free-bench.

See *Widow's eſtate.*

Freehold.

Tenant for life has a freehold, as well as tenant in fee, or tail. 43, 127
So has tenant in tail after poſſibility of iſſue extinct. 43
So, if a leaſe be to two perſons for their lives, both have an ſtate of freehold. 142
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Or, where ſuch eſtate is paſſed by way of ſurrender, deviſe, releaſe or confirmation. *ibid.*
Or, by way of encreaſe or executory grant. *ibid.*
Neither is it requiſite in caſe of incorporeal hereditaments, for it cannot be made. *ibid.*
Nor in ſome caſes, of a grant of the freehold of a corporeal thing. *ibid.*
Nor where one grants all the trees growing on his ground. *ibid.*
Neither is it neceſſary where tenant for life leaſes under a power. *ibid.*
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So, though a leaſe be void by the ſtat. of Frauds, notice is not diſpenſed with. 177
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As, by the cuſtom of London for example. *ibid.*
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Acceptance of rent by the landlord, as rent, is a waiver of a notice to quit. *ibid.*
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Notice to quit is not neceſſary where the tenant holds under a void leaſe. 183
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Otherwiſe, of a leaſe voidable by entry. *ibid.*
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What is ſuch. 176
The old tenancy at will conſtrued to be a tenancy from year to year. *ibid.*
A general parol demiſe does not continue during the round of huſbandry. *ibid.*
But is conſtrued to be a leaſe from year to year. *ibid.*
Except the crop be of a particular nature. *ibid.*
In tenancies from year to year, notice to quit muſt be given.
See *Notice, Fences, &c.*

CORRIGENDA.

CORRIGENDA.

Page 31 marginal reference 3, for *Cowp.* 424, read *Cowp.* 474.
34 ine 24, for *be*, read *by*.
36 laſt line but one, *dele is*.
45 line 32, for *per*. read *pur*.
94 marginal reference 5, for *Doug.* 610, read *Doug.* 632.
96 line 36, for *caſe*, read *leaſe*.
102 line 8, *dele if*.
124 marginal reference 6, infert 2 before *Bl. Com.*
139 laſt line but two, for *leſſor*, read *leſſee*.
151 marginal reference 1, for (*L.* 1.) read (*I.* 1.)
163 line 22, between "the" and "being" infert "*leaſe.*"
213 line 20, for *eſtoppers*, read *eſtovers*.
234 line 22, for *uſual*, read *unuſual*.
245 line 34, for *leſſor*, read *leſſee*.
290 line 1, for *ſtat.* 4 *G.* 3, read *ſtat.* 4 *G.* 2.
319 line 25. for *debt or bond*, read *debt on bond*.
347 line 19, for *demiſed*, read *deviſed*.
374 line 32, for *mortgagees*, read *mortgages*.
— line 34, for *mortgagee*, read *mortgage*.
— line 35. for *mortgagee*, read *mortgage*.
378 line 18, for *plaintiff*, read *defendant*.
383 line 13, for *recovery*, read *rectory*.
— marginal reference 3, for *Latch*, read *Latch*.
409 line 35, for 11 *Geo.* read 4 *Geo.*
410 line 22, between "ſame" and "legally," infert "*cannot be.*"
421 line 9, for *recital in an*, &c. read *recital of an*, &c.
424 line 9, between "is" and "as," infert "*in.*"
470 line 23, for *avoid*, read *award*.
501 *dele* the ſecond paragraph.
517 marginal reference 4, for *Doug.* 779, read *Doug.* 780.
518 line 28, for *with*, read *without*.
531 line 8, for *meritorious*, read *notorious*.
— marginal reference 8, for 6 *T. R.* read 2 *T. R.*
535 line 13, between "defendant" and "guilty," infert *not*."
— 26 for *c.* 22, read *c.* 12.
678 paragraph 10, line 4, for "*a declaration*," read "*and a declaration.*"
700 laſt line of the title "Statutes," for page 303, read 203.

FINIS.

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